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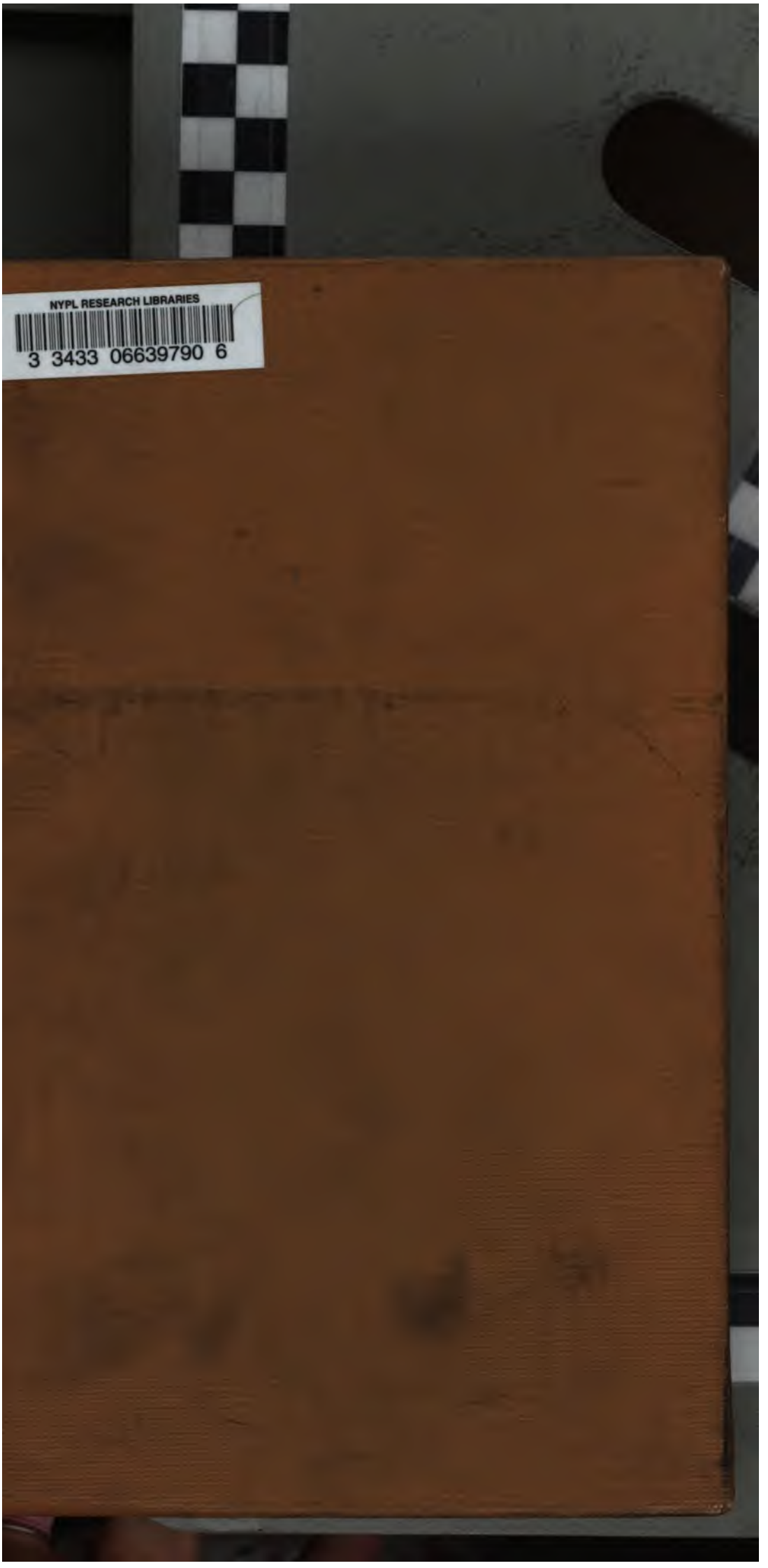
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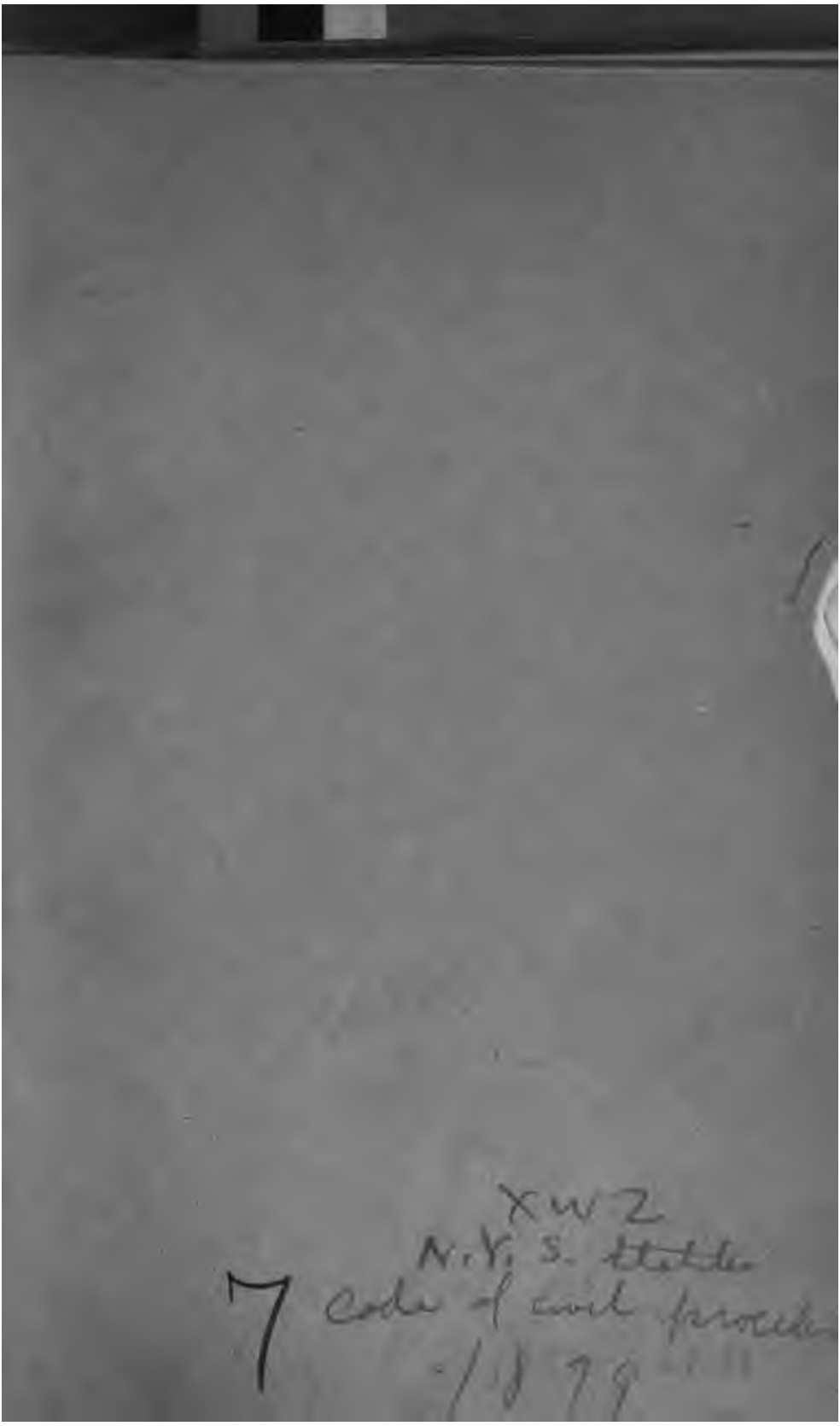
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Code of civil procedure
1879

New York State. Statutes.

THE CODE OF CIVIL PROCEDURE

OF THE

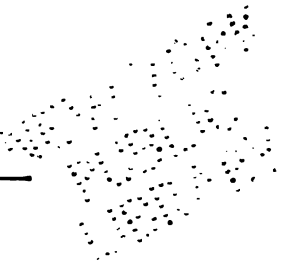
STATE OF NEW YORK,

BEING CHAPTER 448 OF THE LAWS OF 1876, AS AMENDED B CHAPTERS 416 AND 422 OF THE LAWS OF 1877, AND AS FURTHER AMENDED BY CHAPTERS 63, 299 AND 166 OF THE LAWS OF 1878, AND CHAPTERS 163, 210, 414 AND 542 OF THE LAWS OF 1879.

CONTAINING ALSO

CHAPTER 449 OF THE LAWS OF 1876, DEFINING AND REGULATING THE FIR MENTIONED ACT. AND CHAPTER 318 OF THE LAWS OF 1877, SUSPENDING THE OPERATION OF PARTS OF THE CODE UNTIL THE FIRST OF SEPTEMBER, 1877, AND CHAPTER 417 OF 1877, REPEALING CERTAIN ACTS AND PARTS OF ACTS.

THIRD EDITION.



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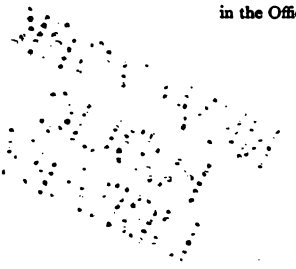

CERTIFICATES.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I, Edgar K. Apgar, Deputy and acting Secretary of State, do hereby certify that the following book contains a correct transcript of the Code of Civil Procedure, passed June 2, 1876, as amended and completed by the acts of the Legislature passed since its enactment.

In witness whereof, I have hereto set my signature, at the city of Albany this twenty-eighth day of August, in the year one thousand eigh hundred and seventy-seven.

[L. S.]

EDGAR K. APGAR,
Deputy and Acting Secretary of State.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I have compared sections 361 and 870 of the Code of Civil Procedure a amended by Chapters 63 and 299 of the Laws of 1878, and do hereby certify that the same are correct transcripts therefrom and of the whole of said origina sections. I further certify, that sections 830 of the Code of Civil Procedur was repealed by Chapter 166 of the Laws of 1878.

Given under my hand and the seal of office of the Secretary of State at the city of Albany, this twenty-fifth day of June, in the yea one thousand eight hundred and seventy-eight.

[L. S.]

ALLEN C. BEACH,
Secretary of State.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE.

I have compared the sections, sub-divisions, and additions of and to th Code of Civil Procedure as amended by Chapters 163, 210, 414, and 542 of th Laws of 1879, and do hereby certify that the same are correct transcript therefrom, and of the whole of said original sections, sub-divisions, an additions.

Given under my hand and the seal of office of the Secretary of State at the city of Albany, this ninth day of July, in the year on thousand eight hundred and seventy-nine.

[L. S.]

ALLEN C. BEACH,
Secretary of State.

PREFACE TO FIRST EDITION.

We present herewith to the public a code which will have the rare distinction of superseding one of such incontestable merit that it was adopted bodily by at least one state of the Union, and served as the best model for several others in revising their method of legal procedure. The so-called "Code of Remedial Justice," which was in force during the first three weeks of last May, was unworthy of the honor thrust upon it. It was crude and pedantic. It was an affliction upon the legal profession, which was almost unanimous in condemning it throughout the State.

Owing to the laborious efforts of a small number of men, composing one of the judiciary committees of the Legislature, this code has been brought to a condition tolerable to the community. By a rigorous system of remodeling—extending to the minutest details and including the restoration of many of the provisions of the old code, which, in clearness and conciseness, could not be excelled—a bill was at length prepared, making amendments to nearly every section. None of these can be said to be unnecessary; and when this bill became a law it met with universal approval.

In this way the work of revising the code of 1876, which we have undertaken, was one almost as difficult as the labor, which the commissioners imposed upon themselves, of revising the old code. We have, however, been animated by the strong conviction that it will, undoubtedly, be more grateful to the profession; and we are satisfied that the perfect accuracy which we have endeavored to attain will sufficiently recommend this edition of the Code of Civil Procedure to public appreciation.

THE EDITOR.

ALBANY, N. Y., *June* 6, 1877.

PREFACE TO SECOND EDITION.

In the second edition of the Code an attempt has been made to present in a concise form the provisions of the Code of Civil Procedure as amended by the Legislature of 1878, and all the provisions of the old Code still in force. For the convenience of the practitioner the volume is preceded by a table containing parallel references between the sections of the new and old Code, and a statement of the statutes repealed by the general repealing act of 1877. This volume does not present the difficulties in readily turning to any provision of law sought for, which exist in the more voluminous editions of the Code, and yet it is believed that nothing is omitted which is desirable as affording easy reference to the existing law prescribing the practice in the courts of record in this State.

THE EDITOR.

DATED *July* 1, 1878.

PREFACE TO THIRD EDITION.

The amendments to the Code of Civil Procedure passed by the Legislature of 1879 are so numerous and important that it was deemed advisable to incorporate them in the text itself, rather than to publish them as a supplement to the second edition of this work. It is hoped that the additional expense incurred by the publishers in so doing may be more than compensated by the increased facility of reference thereby afforded to the profession. It is believed that this volume presents, accurately, and in a compact and concise form, the provisions of the Code of Civil Procedure as now existing, together with such provisions of the old Code as are still in force.

THE EDITOR.

Dated *July* 7, 1879.

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REPEALING ACT.

CHAPTER 417 OF 1877.

REVISED STATUTES.

The following provisions of the Revised Statutes are repealed:

PART 1, Ch. 5, tit. 5, §§ 24, 25, 26, 27.

PART 2, Ch. 1, tit. 5, §§ 5, 6.

Ch. 3, §§ 16, 17, 27.

Ch. 5, tit. 1, art. 1, all.

Ch. 5, tit. 1, art. 6, § 17, the concluding portion beginning "but whenever any person shall have remained charged."

PART 3, Ch. 1, tit. 1, art. 3, all.

Ch. 1, tit. 2, all, except §§ 38, 39, 43, 45, and articles 6 and 7 of that title.

Ch. 1, tit. 3, all.

Ch. 1, tit. 4, §§ 1 to 27, both inclusive, and § 45.

Ch. 1, tit. 5, all except §§ 4, 5, 6, 7, 21, 24, 25, 27, 28 and 29 thereof, and so much of §§ 11 and 14 thereof as relates to criminal courts.

Ch. 2, tit. 4, §§ 245, 246, 247, 248.

Ch. 3, all, except tit. 1, § 14, and except tit. 2, §§ 40, 41, 44, 45, 48, and 54 to 61, both inclusive.

PART 3, Ch. 5, tit. 5, §§ 22 to 29, both inclusive.

Ch. 6, all, except tit. 2, §§ 12, 13; and except tit. 4, § 14, and except tit. 6, arts. 1 and 2.

Ch. 7, all, except tit. 2, §§ 15, 16, and except tit. 3, §§ 63 to 70, both inclusive, and §§ 74, 75, 76.

Ch. 8, tit. 1, all.

Ch. 8, tit. 2, all.

Ch. 8, tit. 3, § 8.

Ch. 8, tit. 4, art. 1, all, except §§ 1, 2, 3, 12, 13, 14, 15.

Ch. 8, tit. 6, so much of §§ 16 to 21 thereof, both inclusive, as relates to petit jurors, and §§ 37 to 42, both inclusive.

Ch. 8, tit. 13, § 1.

Ch. 8, tit. 17, all, except §§ 1, 13, 14, 15, 27, 28, 29, 30, 32, 35.

Ch. 9, tit. 3, all, except § 66, and except so much of art. 3 as applies to appeals from surrogates' courts.

1853, Ch. 338, except § 4 thereof.
Ch. 387.
Ch. 454.
Ch. 494, so much of § 9 as relates to petit jurors.
Ch. 511.
Ch. 529.
Ch. 554.
Ch. 617, §§ 1, 2 and 3 thereof.
1854, Ch. 75.
Ch. 96, except §§ 6, 12, 26 and 27 thereof, and §§ 30 to 39 thereof, both inclusive.
Ch. 198, §§ 1, 5 and 6.
Ch. 270, §§ 1 and 2.
1855, Ch. 279.
Ch. 310, § 3
Ch. 530.
1856, Ch. 166.
1857, Ch. 60.
Ch. 183, § 2.
Ch. 295, § 6.
Ch. 361, except §§ 9 and 10 thereof.
Ch. 567.
1858, Ch. 37.
Ch. 107.
Ch. 244.
Ch. 322, except §§ 1 to 5 thereof, both inclusive; §§ 30 to 35 thereof, both inclusive, and §§ 37 and 38 thereof.
Ch. 334, § 2.
1859, Ch. 134.
Ch. 179, § 2.
Ch. 198.
Ch. 212, § 3.
Ch. 262, § 1.
Ch. 267, § 2.
Ch. 379.
Ch. 440.
1860, Ch. 6.
Ch. 167.
Ch. 187, 202, so much thereof as requires the graduates therein specified to be admitted to practice, upon the production of their diplomas.
1861, Ch. 8.
Ch. 61.
Ch. 73.
Ch. 86.
Ch. 210.
Ch. 288.
1862, Ch. 53.
Ch 86.
Ch. 251.
Ch. 375.
Ch. 378, § 4.
Ch. 471.
Ch. 484, §§ 1 and 2.
1863, Ch. 66, except § 5 thereof.
Ch. 186.
Ch. 200.
Ch. 206.
Ch. 212.
Ch. 246, § 3.
Ch. 412. The second sentence of § thereof.
Ch. 506. So much of § 1 as relates petit jurors.
1864, Ch. 46.
Ch. 95.
Ch. 543.
Ch. 578.
1865, Ch. 170, except § 6 thereof, as amend by § 1 of chapter 796 of the laws 1867.
Ch. 218.
Ch. 296, § 1.
Ch. 309. The concluding portion of § thereof, beginning with the wor "and in any action in any of t courts."
Ch. 512.
Ch. 555.
1866, Ch. 174.
Ch. 175.
Ch. 311.
Ch. 422.
Ch. 437.
Ch. 588.

REPEALING ACT.

1[illegible], Ch. 7[illegible].
Ch. 821, §§ 1 to 10 thereof, both inclusive.
1867, Ch. 116.
Ch. 211.
Ch. 271.
Ch. 383.
Ch. 494.
Ch. 709. The first sentence of § 3 thereof.
Ch. 784.
Ch. 796, §§ 2 and 3.
Ch. 887, except so much thereof as relates to proceedings in a criminal cause.
1868, Ch. 596.
Ch. 765, except §§ 1 and 3 thereof
1869, Ch. 99.
Ch. 133.
Ch. 157, § 1.
Ch. 418.
Ch. 433, § 5
Ch. 589.
Ch. 626.
Ch. 664, § 1.
Ch. 674.
Ch. 807.
Ch. 813.
1870, Ch. 49.
Ch. 86, § 8.
Ch. 313, except §§ 8 and 10 thereof.
Ch. 408, §§ 1 to 8, both inclusive, and §§ 10 to 14, both inclusive.
Ch. 409.
Ch. 467, § 1.
Ch. 470, except §§ 1, 8, 9, 10, 12 and 18 thereof; but the repeal of § 20 does not affect § 7 of chapter 282 of the laws of 1871.
Ch. 539, except §§ 17, 26, 27 and 28 thereof, and so much of § 7 thereof as relates to grand jurors.
Ch. 582, §§ 1, 3 and 5.
Ch. 648, §§ 1 and 2.
1871, Ch. 16.
1871, Ch. 208.
Ch. 282, except § 7 thereof.
Ch. 486.
Ch. 583. The concluding portion of § 5 thereof, beginning with the words "and all returns or proceedings in which the mayor."
Ch. 603, § 2.
Ch. 700.
Ch. 710.
Ch. 733.
Ch. 744.
Ch. 776.
Ch. 799, §§ 1 and 5.
1872, Ch. 16.
Ch. 139.
Ch. 260.
Ch. 438, except so much as relates to criminal courts.
Ch. 499.
Ch. 519.
Ch. 535.
Ch. 538.
Ch. 629, §§ 1, 3, 8 and 12.
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Ch. 778.
1873, Ch. 70. So much of §§ 1 and 2 as prescribes a preference of causes on the calendars of courts.
Ch. 165, § 1.
Ch. 166, § 1.
Ch. 196.
Ch. 212.
Ch. 239.
Ch. 299.
Ch. 427. So much thereof as relates to civil causes.
Ch. 453, §§ 2 and 3.
Ch. 603.
1874, Ch. 52.
Ch. 57, except § 3 thereof.
Ch. 232, except § 5 thereof.
Ch. 322.
Ch. 545, §§ 4, 5, 8 and 13.

REPEALING ACT.

1875, Ch. 3.
Ch. 32.
Ch. 49, § 5.
Ch. 52.
Ch. 127.
Ch. 131.
Ch. 139.
1875, Ch. 167.
Ch. 251, §§ 1 and 4.
Ch. 366.
Ch. 479, except § 41 thereof; §§ 43 to 52 thereof, both inclusive, and §§ 54 and 55 thereof.
Ch. 616.

THE CODE OF CIVIL PROCEDURE,

CHAPTER 448, LAWS OF 1876,

AS AMENDED BY CHAPTERS 416 AND 422, LAWS OF 1877, AND AS FURTHER AMENDED BY CHAPTERS 63, 299 AND 166 OF THE LAWS OF 1878, AND CHAPTERS 163, 210, 414 AND 542 OF THE LAWS OF 1879.

AN ACT RELATING TO COURTS, OFFICERS OF JUSTICE, AND CIVIL PROCEEDINGS.

Passed June 2, 1876; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER I.

GENERAL PROVISIONS RELATING TO COURTS, AND THE MEMBERS AND OFFICERS THEREOF.

TITLE I.—THE COURTS OF THE STATE; THEIR GENERAL POWERS AND ATTRIBUTES, AND GENERAL REGULATIONS PERTAINING TO THE EXERCISE THEREOF.

TITLE II.—PROVISIONS OF GENERAL APPLICATION, RELATING TO THE JUDGES, AND CERTAIN OTHER OFFICERS OF THE COURTS.

TITLE I.

The courts of the State; their general powers and attributes, and general regulations pertaining to the exercise thereof.

ARTICLE 1. Enumeration and classification.
2. General powers and attributes of the courts.
3. Miscellaneous provisions relating to the sittings of the courts.

ARTICLE FIRST.

ENUMERATION AND CLASSIFICATION.

SECTION 1. Courts.
2. Courts of record enumerated.
3. Courts not of record.
4. General provision as to jurisdiction, etc.

SECTION 1. The courts referred to in this act, are enumerated in the Courts next two sections.

TITLE I. Courts of record enumerated.

§ 2. Each of the following courts of the State is a court of record:

1. The court for the trial of impeachments.
2. The court of appeals.
3. The supreme court.
4. A circuit court in each county.
5. A court of oyer and terminer in each county.
6. The court of common pleas for the city and county of New York.
7. The superior court of the city of New York.
8. The court of general sessions of the peace in and for the city and county of New York.
9. The superior court of Buffalo.
10. The city court of Brooklyn.
11. The city court of Long Island city.
12. The city court of Yonkers.
13. A county court in each county, except New York.
14. A court of sessions in each county, except New York.
15. The marine court of the city of New York.
16. The mayor's court of the city of Hudson.
17. The recorder's court of the city of Utica.
18. The recorder's court of the city of Oswego.
19. The justices' court of the city of Albany.
20. A surrogate's court in each county.

Courts not of record

§ 3. Each of the following courts of the State is a court not of record:

1. Courts of justices of the peace in each town, and in certain cities and villages.
2. Courts of special sessions of the peace in each town, and in certain cities and villages.
3. The district courts in the city of New York.
4. The police courts in certain cities and villages.
5. The justices' court of the city of Troy.
6. The municipal court of the city of Rochester.

General provision as to jurisdiction, etc.

§ 4. Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act.

ARTICLE SECOND.

General Powers and Attributes of the Courts.

SECTION 5. The sittings of courts to be public.
6. Courts not to sit on Sunday, except in special cases.
7. General powers of courts of record.
8. Criminal contempts defined.
9. Punishment for criminal contempts.
10. Such contempts in view of court; how punished, etc.
11. Requisites of commitment.
12. Preceding sections limited.
13. Indictment, if offence is indictable.
14. Contempts punishable civilly.
15. No punishment for non-payment of interlocutory costs.
16. Id.; money due upon a contract.
17. Rules of courts of record, how made and revised.
18. Rules to be published.
19. Courts to order calendar printed.
20. Expense to be a county charge.
21. Certain papers may be destroyed.
22. Writs, etc., in name of the people, and in English; abbreviations.
23. Id.; teste and return.

24. Id.; to be subscribed or indorsed. When error, etc., not to vitiate.
25. No discontinuance by reason of vacancy, etc.
26. In New York, one judge may continue proceedings commenced before another.
27. Provisions respecting the seals of courts.
28. Seals of counties.
29. What is a sufficient sealing.
30. New seals.

The sittings of courts to be public.

§ 5. The sittings of every court within this State shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, on account of adultery, seduction, abortion, rape, assault with intent to commit rape, criminal conversation and bastardy, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses and officers of the court.

Courts not to sit on Sunday, except in special cases.

§ 6. A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of a court on Saturday, unless made after a cause has been committed to a jury, must be to some other day than Sunday. But this section does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or, in a criminal case, to arrest, commit or discharge a person charged with an offence.

General powers of courts of record.

§ 7. A court of record has power:

1. To issue a subpœna, requiring the attendance of a person found in the State, to testify in a cause pending in that court; subject, however, to the limitations, prescribed by law, with respect to the portion of the State, in which the process of a local court of record may be served.

2. To administer an oath to a witness, in the exercise of the powers and duties of the court.

3. To devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

Criminal contempts defined.

§ 8. A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

Punishment for criminal contempts.

§ 9. Punishment for a contempt, specified in the last section, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such contempts in view of court; how punished, etc.

§ 10. Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defence.

TITLE 2.

he is a party, etc., or has not heard argument.

has been attorney or counsel, or in which he is interested, or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties. A judge, other than a judge of the court of appeals, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.

Judge not to be interested in costs.

§ 47. A judge shall not, directly or indirectly, be interested in the costs of an action or special proceeding, brought before him, or in a court of which he is, or is entitled to act as a member, except an action or a special proceeding to which he is a party, or in which he is interested.

Disability of judge in certain appeals.

§ 48. Where an appeal has been taken to a court of sessions, in which a town in the county is interested, a justice of the peace, who is a resident of that town, shall not sit as a justice of sessions, upon the hearing of the appeal. Except as specified in this section, a judge of a court of record is not disqualified, from hearing or deciding an action or special proceeding, matter, or question, by reason of his being a resident or a tax-payer of a town, village, city, or county, interested therein.

Judge or judge's partner not to practice in his court.

§ 49. A judge shall not practice or act as an attorney or counsellor, in a court of which he is, or is entitled to act as a member, or in a cause originating in that court. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, ex-officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein. An ex-officio judge shall not, directly or indirectly, be interested in the costs, or the compensation of an attorney or counsellor, in the court of which he is ex-officio a judge.

Judge's partner or clerk not to practice before him, judge not to practice in a cause which has been before him.

§ 50. The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him. A judge shall not act as attorney or counsellor in any action or special proceeding, which has been before him in his official character.

Judge not to take fees for advice in certain cases.

§ 51. A judge or other judicial officer, shall not demand or receive a fee or other compensation, for giving his advice in a matter or thing pending before him, or which he has reason to believe will be brought before him for decision; or for preparing a paper or other proceeding, relating to such a matter or thing; except a justice of the peace, in a case where a fee is expressly allowed to him by law.

Substitution of one officer for another in special proceeding.

§ 52. In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer, before whom a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county, before an officer in an adjoining county, who would originally have had jurisdiction of the subject-matter, if it had occurred or existed in the latter county.

Proceedings before substituted officer.

§ 53. At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before

ıer, may act, with respect to the special proceeding, as if it had originally instituted before him. But a proceeding shall not be ı before a substituted officer, at a time or place, other than that fied in the original notice or order, until notice of the substitution, of the time and place appointed for the proceeding to be taken, ɔeen given, either by personal service or by publication, in such ıer and for such time as the substituted officer directs, to each party ıay be effected* thereby, and who has not appeared before either r. Where, after a hearing has been commenced, it is adjourned ɔ next judicial day, each day to which it is so adjourned, is re-ɔd, for the purposes of this section, as the day specified in the ıal notice or order, or in the notice to appear before the substituted r, as the case requires.

54. A judge of a court of record must, within ten days after he 's on the duties of his office, make and sign a certificate, stating ge, and the time when his official term will expire, either by com-ɔn of a full term, or by reason of the disability of age, prescribed ıe Constitution. The certificate must be filed in the office of the tary of State, who must keep a record of the time of the com-ɔement and termination of the official term, of each judge of a of record. Judge to file certificate of age, etc.

ARTICLE SECOND.

Attorneys and Counsellors at Law.

ɔs 55. Party may appear in person or by attorney.
56. Examination and admission of attorneys.
57. Rules, how changed.
58. Exemptions to graduates of certain law schools.
59. Attorney's oath of office, and certificate of admission.
60. Attorneys residing in adjoining States.
61. Clerks, etc., not to practice.
62. Id.; as to sheriff, etc.
63. None but attorneys to practice in New York and Kings counties.
64. Penalty for violation, or suffering violation of last section.
65. Death or disability of attorney; proceedings thereupon.
66. Attorney or counsel's compensation.
67. Removal or suspension for malpractice, etc.
68. Must be on notice.
69. Removal or suspension, how to operate.
70. Punishment for deceit, etc.
71. Id.; for wilful delay of action.
72. Attorney not to lend his name.
73. Attorney not to buy claim.
74. Certain loans prohibited.
75. Penalty.
76. Limitation of preceding sections.
77. Same rule when party prosecutes in person.
78. Partner of district attorney, etc., not to defend prosecutions.
79. Attorney not to defend when he has been public prosecutor.
80. Penalty.
81. Limitation of provisions.

55. A party to a civil action, who is of full age, may prosecute or ɔnd the same in person or by attorney, at his election unless he been judicially declared to be incompetent to manage his affairs. ɔh provision of this act, relating to the conduct of an action, ɔrein the attorney for the party is mentioned, includes a party Party may appear in person or by attorney.

TITLE I.

names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.

Id.; teste and return.

§ 23. A writ or other process, issued out of a court of record, must be tested, except where it is otherwise specially prescribed by law, in the name of a judge of the court, on any day; must be returnable within the time prescribed by law; or, if no time is prescribed by law, within the time fixed by the court, and therein specified for that purpose; and, when returnable, must, together with the return thereto, be filed with the clerk, unless otherwise specially prescribed by law.

Id.; to be subscribed or indorsed. When error, etc., not to vitiate.

§ 24. A writ or other process, issued out of a court of record, must, before the delivery thereof to an officer to be executed, be subscribed or indorsed with the name of the officer by whom, or by whose direction it was granted, or the attorney for the party, or the person at whose instance it was issued. A writ or other process thus subscribed or indorsed, is not void or voidable, by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the clerk, unless it was issued by special order of the court.

No discontinuance by reason of vacancy, etc.

§ 25. An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the re-election or re-appointment of a judge; but it must be continued, heard and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do by the court in which the action or special proceeding is pending.

In New York, one judge may continue proceedings commenced before another.

§ 26. In the city and county of New York, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record, may be continued from time to time, before one or more other judges of the same court, with like effect, as if it had been instituted or commenced before the judge, who last hears the same.

Provisions respecting the seals of courts.

§ 27. The seal of the court of appeals, and of each other court of record in the State, now in use, shall continue to be the seal of the court in which it is in use: and the seal kept by the county clerk of each county, shall continue to be the seal of the supreme court, of the circuit court, of the court of oyer and terminer, in that county, and, except in the city and county of New York, of the county court and court of sessions, in that county. The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer, who discharges the duties of the surrogate. A description of each of the seals, specified in this section, must be deposited and recorded in the office of the Secretary of State, unless it has already been done; and must remain of record.

Seals of counties.

§ 28. The seal kept by a county clerk, as prescribed in the last section, shall continue to be the seal of the county, and must be used by him where he is required to use an official seal.

What is a sufficient sealing.

§ 29. The seal of a court may be affixed, by making an impression directly upon the paper.

New seals.

§ 30. When the seal of a court is so injured, that it cannot be conveniently used, the court must cause it to be destroyed; and when the

seal of a court is lost or destroyed, the court must cause a new seal to be made, similar in all respects to the former seal, which shall become the seal of the court. The expense of a new seal for a county clerk, a surrogate's court, or a local court in a city, must be paid as part of the contingent expenses of the county or of the court, as the case requires. The expense of a new seal for any other court must be paid from the State treasury.

ARTICLE THIRD.

MISCELLANEOUS PROVISIONS RELATING TO THE SITTINGS OF THE COURTS.

SECTION 31. Rooms, fuel, etc., how furnished.
32. No liquors, etc., to be sold in court-house.
33. Penalty.
34. Adjournment of court to a future day.
35. Adjournment to next day, judge not appearing.
36. When court to be adjourned without day.
37. Causes tried elsewhere than at court-house.
38. Governor may change place for holding courts of record.
39. Such appointment, etc., to be recorded and published.
40. Judge may change place for holding court of record.
41. Actual session may be adjourned to another place.
42. Place for holding courts in city of New York, how changed.
43. When court-house is unfit to hold court, another place to be appointed.
44. No action or special proceeding abated, etc., by failure or adjournment of court.
45. Trial once commenced may be continued beyond term.

Rooms, fuel, etc., how furnished.

§ 31. Except where other provision is made therefor by law, the board of supervisors of each county must provide each court of record, appointed to be held therein, with proper and convenient rooms and furniture, together with attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of its business. If the supervisors neglect so to do, the court may order the sheriff to make the requisite provision; and the expense incurred by him in carrying the order into effect, when certified by the court, is a county charge.

No liquors, etc., to be sold in court-house.

§ 32. Strong, spirituous, or fermented liquor, or wine, shall not, on any pretence whatever, be sold within a building established as a court-house for holding courts of record, while such a court is sitting therein.

Penalty.

§ 33. A person violating the last section is guilty of a misdemeanor.

Adjournment of court to a future day.

§ 34. A general, special, or trial term of a court of record may be adjourned, from day to day, or to a specified future day, by an entry in the minutes. Jurors may be drawn for, and notified to attend a term so adjourned, and causes may be noticed for trial thereat, as if it was held by original appointment. Any judge of the court may so adjourn a term thereof, in the absence of a sufficient number of judges to hold the term.

Adjournment of term, judge not appearing.

§ 35. If a judge, authorized to hold a term of a court, does not come to the place, where the term is appointed to be held, before four o'clock in the afternoon of the day so appointed, the sheriff or clerk must then open the term, and forthwith adjourn it to nine o'clock in the morning of the next day. If such a judge attend by four o'clock, in the afternoon of the second day, he must open the term; otherwise the sheriff or the clerk must adjourn it without day.

prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party, against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action.

Attorney not to buy claim.

§ 73. An attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

Certain loans prohibited.

§ 74. An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon. But this section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received

Penalty.

§ 75. An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

Limitation of preceding sections.

§ 76. The last three sections do not prohibit the receipt, by an attorney or counsellor, of a bond, promissory note, bill of exchange, book-debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying or receiving a bill of exchange, draft, or other thing in action, for the purpose of remittance, and without intent to violate either of those sections.

Same rule when party prosecutes in person.

§ 77. The last four sections apply to a person prosecuting an action in person, who does an act, which an attorney or counsellor is therein forbidden to do.

Partner of district attorney, etc., not to defend prosecutions.

§ 78. An attorney or counsellor shall not, directly or indirectly, advise concerning, aid, or take any part in, the defence of an action or special proceeding, civil or criminal, brought, carried on, aided, advocated, or prosecuted, as Attorney-General, district-attorney, or other public prosecutor, by a person with whom he is interested or connected, either directly or indirectly, as a law partner; or take or receive, directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement whatever, either express or implied, having relation thereto, or to the prosecution or defence thereof.

Attorney not to defend when he has been public prosecutor.

§ 79. An attorney or counsellor, who has brought, carried on, aided, advocated, or prosecuted, or has been in anywise connected with, an action or special proceeding, civil or criminal, as Attorney-General, district-attorney, or other public prosecutor, shall not, at any time thereafter, directly or indirectly, advise concerning, aid, or take any part in, the defence thereof; or take or receive, either directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement, either express or implied, having relation thereto, or to the prosecution or defence thereof.

Penalty.

§ 80. An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

Limitation of provisions.

§ 81. This article does not prohibit an attorney or counsellor from defending himself in person, if prosecuted either civilly or criminally.

ARTICLE THIRD.

GENERAL PROVISIONS CONCERNING CERTAIN MINISTERIAL OFFICERS, CONNECTED WITH THE ADMINISTRATION OF JUSTICE; AND SPECIAL PROVISIONS CONCERNING OFFICERS OF THAT DESCRIPTION, ATTACHED TO TWO OR MORE COURTS.

SECTION 82. Qualifications of stenographer.
83. General duty of stenographer; notes, when to be filed.
84. Notes, how preserved; when written out.
85. Stenographers to furnish gratuitously copies of proceedings, to judge.
86. To furnish like copies to parties, district-attorney and Attorney-General; compensation.
87. These sections applicable to assistant stenographers.
88. Supervisors to provide for compensation, etc., of stenographers.
89. County clerk to appoint special deputy to attend courts.
90. County judge to appoint crier.
91. Clerk of Dutchess county to be crier in that county.
92. When sheriff, constable, etc., to act as crier.
93. Attendants upon courts in New York city.
94. Interpreter for courts of record in Kings county.
95. Attendants and messengers, how appointed in Kings county.
96. Duties of persons appointed under last section.
97. Sheriff, when directed, to require constables, etc., to attend courts.
98. Id., when not directed.
99. Penalty for neglect of officer to attend court.

Qualifications of stenographer.

§ 82. Each stenographer, specified in this act, is an officer of the court or courts, for or by which he is appointed; and, before entering upon the discharge of his duties, must subscribe the Constitutional oath of office, and file the same in the office of the clerk of the court, or, in the supreme court, in the office of the clerk of the county where the term sits, or the judge resides, by which or by whom he is appointed. A person shall not be appointed to the office of stenographer, unless he is skilled in the stenographic art.

General duty of stenographer; notes, when to be filed.

§ 83. Each stenographer, specified in this act, must, under the direction of the judge, presiding at or holding the term or sitting which he attends, take full stenographic notes of the testimony, and of all other proceedings, in each cause tried or heard thereat, except when the judge dispenses with his services in a particular cause, or with respect to a portion of the proceedings therein. The court, or a judge thereof, may, in its or his discretion, upon or without an application for that purpose, make an order, directing the stenographer to file with the clerk, forthwith or within a specified time, the original stenographic notes, taken upon a trial or hearing; whereupon the stenographer must file the same accordingly.

Notes, how preserved; when written out.

§ 84. The original stenographic notes, taken by a stenographer, are part of the proceedings in the cause; and, unless they are filed, pursuant to an order, made as prescribed in the last section, they must be carefully preserved by the stenographer, for two years after the trial or hearing; at the expiration of which time he may destroy the same. If the stenographer dies, or his office becomes otherwise vacant, before the expiration of that time, they must be delivered to his successor in office, to be held by him with like effect, as if they had been taken by him. They must be written out at length by the stenographer, if a judge of the court so directs, or if the stenographer is required so to do, by a person entitled by law to a copy of the same, so written out. Unless such a direction is given, or such a requisition is made, the stenographer is not bound so to write them out.

TITLE 2.

Stenographers to furnish gratuitously copies of proceedings, to judge.

§ 85. Each stenographer, specified in this act, must, upon request, furnish, with all reasonable diligence and without charge, to the judge holding a term or sitting, which he has attended, a copy, written out at length from his stenographic notes, of the testimony and proceedings, or a part thereof, upon a trial or hearing, at that term or sitting. But this section does not affect a provision of law, authorizing the judge to direct a party or the parties to an action or special proceeding, or the county treasurer, to pay the stenographer's fees for such a copy.

To furnish like copies to parties, district attorney and attorney-general; compensation.

§ 86. Each stenographer, specified in this act, must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party, or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring the same, of the fees allowed by law. If the district-attorney or the Attorney-General requires such a copy, in a criminal cause, the stenographer is entitled to his fees therefor; but he must furnish it, upon receiving a certificate of the sum to which he is so entitled; which shall be a county charge, and must be paid by the county treasurer, upon a certificate, like other county charges.

These sections applicable to assistant stenographers.

§ 87. The provisions of the last five sections are also applicable to each assistant-stenographer, now in office, or appointed or employed, pursuant to any provision of this act; except that the stenographic notes, taken by an assistant-stenographer, must, if he dies or his office becomes otherwise vacant, be delivered to the stenographer, to be held by him with like effect, as if they had been taken by him.

Supervisors to provide for compensation, etc., of stenographers.

§ 88. The board of supervisors of each county must provide for the payment of the sums chargeable upon the treasury of the county, for the salary, fees, or expenses of a stenographer or assistant-stenographer; and all laws relating to raising money in a county, by the board of supervisors thereof, are applicable to those sums.

County clerk to appoint special deputy to attend courts.

§ 89. Each county clerk may, from time to time, by an instrument in writing, filed in his office, appoint, and at pleasure remove, one or more special deputy-clerks, to attend upon any or all of the terms or sittings of the courts of which he is clerk. Each person so appointed must, before he enters upon the duties of his office, subscribe, and file in the clerk's office, the constitutional oath of office; and he possesses the same power and authority as the clerk, at any sitting or term of the court which he attends, with respect to the business transacted thereat.

Clerk in New York, or Kings, not to be referee, etc.

§ 90. No person holding the office of clerk, deputy-clerk, special deputy-clerk, or assistant in the clerk's office, of a court of record or of the surrogate's court, within either of the counties of New York or Kings, shall hereafter be appointed, by any court or judge, a referee, receiver or commissioner, except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead.

Crier for courts of record, in certain counties.

§ 91. The county judge of each county, except Kings and Dutchess, from time to time, may appoint, and at pleasure remove, a crier for the courts of record held in his county; who is entitled to a compensation fixed and to be paid as prescribed by law. The clerk of the county of Dutchess, or in his absence the deputy-clerk, must act as crier at each term of a court of record held in that county. He is entitled therefor to a compensation, fixed and to be paid as prescribed by law.

ART. 3.

§ 92. A sheriff, deputy-sheriff, or constable, attending a term of a court of record, must, when required by the court, act as crier therein; and he is not entitled to any additional compensation for that service. When sheriff, constable, etc., to act as crier.

§ 93. The judges, or a majority of them, of each of the following named courts, to wit: the supreme court within the first judicial district; the court of common pleas for the city and county of New York; and the superior court of the city of New York, from time to time, may appoint, and at pleasure remove, such attendants upon the court of which they are respectively members, including, where the justices of the supreme court make the appointment, the circuit court, and court of oyer and terminer, as they think necessary for the due transaction of the business thereof; not exceeding four attendants for each part, and four for the general term. Attendants upon courts in New York city.

§ 94. The board of supervisors of the county of Kings may appoint an interpreter, to attend the terms of the courts of record, except the county court, held in that county, at which issues of fact are triable; who shall hold his office during good behavior. Interpreter for courts of record in Kings county.

§ 95. The following judges, to wit: the justices of the supreme court for the second judicial district, residing in Kings county, or a majority of them; the judges of the city court of Brooklyn, or a majority of them; the county judge of Kings county; and the surrogate of Kings county; may designate how many attendants and messengers, for the appointment of whom no provision is otherwise made by law, are required to attend upon the terms and sittings of the courts, of which they are respectively members; including, where the justices of the supreme court make the designation, the circuit court and court of oyer and terminer. Notice of each designation must be given to the sheriff of Kings county, by the clerk of the court. The sheriff must thereupon appoint as many qualified persons, to fill those offices for each court, as the judges thereof have designated. The number of those officers may, from time to time, be increased or diminished, and new appointments may be made, in like manner. A person so appointed may be removed from office, by the judge of the court to which he is assigned; or, if he is assigned to the supreme court, or the city court of Brooklyn, by a majority of the judges; and the sheriff shall not re-appoint, for the same court, a person so removed. Attendants and messengers, how appointed in Kings county.

§ 96. Each of the persons, appointed as prescribed in the last section, must attend, from day to day, the terms and sittings, within the county of Kings, of the court to which he is assigned, to preserve order, and to perform whatever services may be required of him, by the judge presiding thereat. Duties of persons appointed under last section.

§ 97. The sheriff of each county, except New York and Kings, must, within a reasonable time before the sitting, in his county, of a special term of the supreme court, or a term of the circuit court, county court, court of oyer and terminer, or court of sessions, notify, in writing and personally, as many constables of his county, as he has been directed to notify, by the court, or the judge who is to hold or preside at the term, to appear and attend upon the term, during its sitting. Sheriff, when directed to notify constables, etc., to attend courts.

§ 98. If such a direction has not been given by the court or the judge, the sheriff may in like manner notify as many constables, as he deems necessary, for the purpose specified in the last section. Id., when not directed.

§ 99. Each constable seasonably notified, as prescribed in the last two sections, must attend the term accordingly; and for each day's neglect, he may be fined by the court, at the term which he was notified to attend, a sum not exceeding five dollars. Penalty for neglect of officer to attend court.

CHAPTER II.

POWERS, DUTIES, AND LIABILITIES OF A SHERIFF, OR OTHER MINISTERIAL OFFICER, IN THE EXECUTION OF THE PROCESS OR OTHER MANDATE OF A COURT OR JUDGE, IN A CIVIL CASE.

TITLE I.—PROVISIONS RELATING TO THE EXECUTION OF CIVIL MANDATES GENERALLY.

TITLE II.—PROVISIONS RELATING TO THE EXECUTION, BY A SHERIFF, OF A MANDATE AGAINST THE PERSON.

TITLE III.—APPLICATION OF THE FOREGOING PROVISIONS TO THE PROCEEDINGS OF A CORONER.

TITLE IV.—POWERS, DUTIES, AND LIABILITIES OF AN INCOMING AND OUTGOING SHERIFF, RESPECTIVELY, TOUCHING THE MATTERS INCLUDED IN THIS CHAPTER.

TITLE I.

Provisions relating to the execution of civil mandates generally.

SECTION 100. Sheriff to furnish certain minute.
101. Copy of process, etc., to be delivered when served.
102. Sheriff to execute process, etc.; may return by mail.
103. Penalty for neglect in special proceedings.
104. Sheriff may summon the power of the county, to overcome resistance.
105. Names of resisters to be certified.
106. Punishment for refusing to assist.
107. Governor may order out military.
108. Trial of claim of title by third person, to property seized by sheriff.
109. Expenses, how paid.

Sheriff to furnish certain minute.

§ 100. A sheriff, to whom a mandate of any description, is delivered to be executed, must, without compensation, give to the person delivering the same, if required, a minute in writing, signed by the sheriff, specifying the names of the parties, the general nature of the mandate, and the day and hour of receiving the same.

Copy of process, etc., to be delivered when served.

§ 101. A sheriff, or other officer, serving a mandate, must, upon the request of the person served, deliver to him a copy thereof, without compensation.

Sheriff to execute process, etc.; may return by mail.

§ 102. A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision, he is liable to the party aggrieved, for the damages sustained by him; in addition to any fine, or other punishment or proceeding, authorized by law. A mandate directed and delivered to a

sheriff may be returned, by depositing the same in the post-office, properly inclosed in a post-paid wrapper, addressed to the clerk, at the place where his office is situated; unless the officer, making the return in the name of the sheriff, resides in the place where the clerk's office is situated.

Liability for neglect in special proceedings.

§ 103. A sheriff, or other officer, to whom is delivered, for service or execution, a mandate, authorized by law to be issued, by a judge or other officer, in a special proceeding, who wilfully neglects to execute the same, may be fined by the judge, in a sum not exceeding twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby.

Sheriff may summon the power of the county, to overcome resistance.

§ 104. If a sheriff, to whom a mandate is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command all the male persons in his county, or as many as he thinks proper, and with such arms as he directs, including any military organization armed and equipped, to assist him in overcoming the resistance, and, if necessary, in arresting and confining the resisters, their aiders and abettors, to be dealt with according to law.

Names of resisters to be certified.

§ 105. The sheriff must certify to the court, from which or by whose authority the mandate was issued, the names of the resisters, their aiders and abettors, as far as he can ascertain the same, to the end that they may be punished for their contempt of the court.

Punishment for refusing to assist.

§ 106. A person, commanded by a sheriff to assist him, as prescribed in the last section but one, who, without lawful cause, refuses, or neglects to obey the command, is guilty of a misdemeanor.

Governor may order out military.

§ 107. If it appears to the Governor, that the power of a county will not be sufficient, to enable the sheriff thereof to serve or execute the process or other mandates, delivered to him, he must, on the application of the sheriff, order such a military force, from another county or counties, as is necessary.

Trial of claim of title by third person, to property seized by sheriff.

§ 108. Where it is specially prescribed by law, that a sheriff must, or may, in his discretion, empanel a jury to try the validity of a claim or title to, or of the right of possession of goods or effects, seized by him by virtue of a mandate in an action, interposed by a person not a party to the action, the trial must be conducted in the following manner, except as otherwise specially prescribed by law:

1. The sheriff must, from time to time, notify as many persons to attend, as it is necessary, in order to form a jury of twelve persons, qualified to serve as trial jurors in the county court of the county, or, in the city and county of New-York, in the court of common pleas for that city and county, to try the validity of the claim.

2. Upon the trial, witnesses may be examined, in behalf of the claimant, and of the party, at whose instance the property claimed was taken by the sheriff. For the purpose of compelling a witness to attend and testify, the sheriff, upon the application of either party to the inquisition, must issue a subpœna, as prescribed in section eight hundred and fifty-four of this act, and with like effect; except that a warrant to apprehend or to commit a witness, in a case specified in section eight hundred and fifty-five or section eight hundred and fifty-six of this act, may be issued by a judge of the court in which the action is brought, or by the county judge, or, in the city and county of New-York, by a judge of the court of common pleas for that city and county.

3. The sheriff or under-sheriff must preside upon the trial. A witness, produced by either party, must be sworn by the presiding

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officer, and examined orally in the presence of the jury. A witness, who testifies falsely upon such an examination, is guilty of perjury in a like case, and is punishable in like manner, as upon the trial of a civil action.

Expenses, how paid.

§ 109. Upon such a trial there are no costs; but the fees of the sheriff, jurors, and witnesses must be taxed, by a judge of the court, or the county judge of the county, or, in the city and county of New-York, by a judge of the court of common pleas for that city and county, and must be paid as follows:

1. If the jury, by their verdict, find the title, or the right of possession to the property claimed, to be in the claimant; by the party at whose instance the property was taken by the sheriff.

2. If they find adversely to the claimant, with respect to all the property claimed; by the claimant.

3. If they find the title, or the right of possession to only a part of the property claimed, to be in the claimant; each party must pay his own witnesses' fees; and the sheriff's and jurors' fees must be paid, one-half by each party to the inquisition.

Before notifying the jurors, the sheriff may, in his discretion, require each of the parties to the controversy to deposit with him such reasonable sum, as may be necessary to cover his legal fees, and the jurors' fees. The sheriff must return to each party the balance of the sum so deposited by him, after deducting the fees, lawfully chargeable to that party, as prescribed in this section.

TITLE II.

Provisions relating to the execution, by a sheriff, of a mandate against the person.

ARTICLE 1. Arresting, conveying to jail, and committing a prisoner.
2. Jails; jail discipline; and regulations concerning the confinement and care of prisoners.
3. Temporary jails, and temporary removal of prisoners from jail.
4. Jail liberties; escapes.
5. Action upon and assignment of a bond for jail liberties.

ARTICLE FIRST.

ARRESTING, CONVEYING TO JAIL, AND COMMITTING A PRISONER.

SECTION 110. Prisoner, how kept.
111. Support of prisoner in Kings county.
112. Id.; in other counties.
113. Charges for food, etc., when prohibited.
114. Also for waiting for prisoner.
115. Rates of charges for lodging, etc.
116. Prisoner may send for necessaries.
117. Charges for rent, etc., prohibited.
118. Prisoner how conveyed to jail through another county.
119. Officer or prisoner not liable to arrest.

Prisoner, how kept.

§ 110. A person arrested, by virtue of an order of arrest, in action or special proceeding brought in a court of record; or of execution issued upon a judgment rendered in a court of record;

dered in exoneration of his bail; must be safely kept in custody, manner prescribed by law, and, except as otherwise prescribed next two sections, at his own expense, until he satisfies the ent rendered against him, or is discharged according to law.

Support of prisoner in Kings county.

1. In the county of Kings, when the sheriff has actually con- n jail a prisoner so arrested or surrendered, he must serve upon intiff's attorney, as prescribed by law for the service of a paper n attorney in an action, a written notice, stating that he has so d the prisoner, and that the plaintiff is required to make the nts specified in this section, in default whereof the prisoner will harged. Within three days after service of the notice, or six f the service is by mail, the plaintiff must pay to the sheriff the twenty-five dollars, for the support of the prisoner for the first days, after his actual confinement in jail, unless in the mean- e is discharged or admitted to the jail liberties. At or before iration of each subsequent period of twenty days, during which soner has been so confined, the plaintiff must pay a like sum sheriff, for the prisoner's support during the ensuing twenty If a payment required by this section is not made, the prisoner e discharged. The sheriff must apply all the money so paid, to port of the prisoner, unless he is admitted to the jail liberties harged; in which case he must refund to the plaintiff's attorney le portion of the last payment, according to the period of time, which the prisoner was so confined.

Id.; in other counties.

2. In any county except Kings, if a prisoner, actually confined makes oath before the sheriff, jailor, or deputy-jailor, that he is to support himself during his imprisonment, his support is a charge.

Charges for food, etc., when prohibited.

3. A sheriff or other officer shall not charge a person, whom he ested, with any sum of money, or demand, or receive from him or any valuable thing, for any drink, victuals, or other thing, ed or provided for the officer, or for the prisoner, at any tavern, se, or public victualing or drinking-house.

Also for waiting for prisoner.

4. A sheriff or other officer shall not demand or receive from a arrested by him, while in his custody, a gratuity or reward, ny pretence, for keeping the prisoner out of jail; for going im or waiting for him to find bail, or to agree with his adver- or for any other purpose.

Rates of charges for lodging, etc.

5. If a person arrested is kept in a house other than the jail of nty, the officer arresting him, or the person in whose custody shall not demand or receive from him any greater sum, for lodg- rink, victuals, or any other thing, than has been theretofore pre- l by the court of sessions of the county; or, if no rate has been ibed by the court of sessions, than is allowed by a justice of the of the same town or city, upon proof that the lodging or other was actually furnished, at the request of the prisoner. And an officer or person shall not, in any case or upon any pretext, d or receive compensation for strong, spirituous, or fermented , or wine, sold or delivered to the prisoner.

Prisoner may send for necessaries.

6. A prisoner so kept in a house, may send for and have beer, ider, tea, coffee, milk, and necessary food, and such bedding, and other necessary things, as he thinks fit, from whom he s, without detention of the same or any part thereof by, or pay- r the same, or any part thereof to, the officer arresting him, or rson in whose custody he is.

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Charges for rent, etc., prohibited.

§ 117. A sheriff, jailor, or other officer, shall not demand or receive money, or any valuable thing, for chamber rent in a jail; or any fee, compensation, or reward, for the commitment, detaining in custody, release, or discharge of a prisoner, other than the fees expressly allowed therefor by law.

Prisoner, how conveyed to jail through another county.

§ 118. A sheriff or other officer, who has lawfully arrested a prisoner, may convey his prisoner through one or more other counties, in the ordinary route of travel, from the place where the prisoner was arrested, to the place where he is to be delivered or confined.

Officer or prisoner not liable to arrest.

§ 119. A prisoner so conveyed, or the officer having him in custody, is not liable to arrest in any civil action or special proceeding, while passing through another county.

ARTICLE SECOND.

JAILS; JAIL DISCIPLINE; AND REGULATIONS CONCERNING THE CONFINEMENT AND CARE OF PRISONERS.

SECTION 120. Jail in New York city.
121. Jails in other counties.
122. Either of several jails may be used.
123. Civil and criminal prisoners to be kept separate.
124. Males and females to be kept separate.
125. Penalties.
126. Jail physician.
127. Removal of sick prisoners.
128. Sale of liquor in jails.
129. Permit, when granted.
130. Penalties for violation.
131. Service of papers on prisoner.
132. Sheriff to permit access for that purpose.
133. Prisoners under United States process.
134. Sheriff answerable for their custody.

Jail in New York city.

§ 120. The building, now used as a jail in the city of New York, for the confinement of prisoners in civil causes, shall continue to be the jail of the city and county of New York, for the confinement of such persons; and the sheriff of the city and county of New York shall have the custody thereof, and of the prisoners in the same.

Jails in other counties.

§ 121. The buildings, now used as the jails of the other counties of the State, shall continue to be the jails of those counties respectively, until other buildings have been designated or erected for that purpose, according to law; and the sheriff of each county shall have the custody of the jail or jails of his county, and of the prisoners in the same.

Either of several jails may be used.

§ 122. The sheriff of a county, in which there is more than one jail, may confine a prisoner in either; and may remove him from one jail to another, within the county, whenever he deems it necessary for his safe keeping, or for his appearance at court.

Civil and criminal prisoners to be kept separate.

§ 123. A prisoner, arrested in a civil cause, must not be kept in a room, in which any prisoner, detained on a criminal charge or conviction, is confined.

Males and females to be kept separate.

§ 124. Male and female prisoners must not be put in the same room; except that a husband and his wife may be put or kept together, in a room wherein there are no other prisoners.

Penalties.

§ 125. A sheriff, or other officer, who wilfully violates any of the foregoing provisions of this title, forfeits to the person aggrieved,

treble damages. He is also guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

Jail physician.

§ 126. The board of supervisors of each county, except New York, must appoint some reputable physician, duly authorized to practice medicine, as the physician to the jail of the county. If there is more than one jail they must appoint a physician to each. The common council of the city of New York must appoint a similar physician, to the jail of that city and county. The physician to a jail holds his office at the pleasure of the board which appointed him, except in the county of Kings. In that county, the term of his office is three years.

Removal of sick prisoners.

§ 127. If the physician to a jail, or, in case of a vacancy, a physician acting as such, and the warden or jailor, certify in writing, that a prisoner, confined in the jail in a civil cause, is in such a state of bodily health, that his life will be endangered, unless he is removed to a hospital for treatment, the county judge, or, in the city and county of New York, one of the judges of the court of common pleas, must, upon application, make an order, directing the removal of the prisoner to a hospital within the county, designated by the judge; or, if there is none, to such nearest hospital as the judge directs; that the prisoner be kept in the custody of the chief officer of the hospital, until he has sufficiently recovered from his illness, to be safely returned to the jail; that the chief officer of the hospital then notify the warden or jailor, and that the latter thereupon resume custody of the prisoner. If the prisoner actually escapes, while going to, remaining at, or returning from the hospital, a new execution may be issued against his person, if he was in custody by virtue of an execution; or, if he was in custody by virtue of an order of arrest, a new order of arrest may be granted, upon proof by affidavit of the facts specified in this section, without other proof, and without an undertaking.

Sale of liquor in jails.

§ 128. Strong, spirituous, or fermented liquor, or wine, shall not, on any pretence, be sold within a building used and established as a jail. Spirituous, fermented or other liquor, except cider, and that quality of beer called table-beer, shall not be brought into a jail for the use of a person confined therein, without a written permit by the physician to the jail, which must be delivered to and kept by the keeper thereof, specifying the quantity and kind of liquor which may be furnished, the name of the prisoner for whom, and the time during which the same may be furnished.

Permit, when granted.

§ 129. Such a permit shall not be granted, unless the physician is satisfied, that the liquor allowed to be furnished is necessary for the health of the prisoner, for whose use it is permitted; and that fact must be stated in the permit.

Penalties for violation.

§ 130. A person who brings into or sells in a jail, strong, spirituous, fermented, or other liquor, or wine, contrary to the foregoing provisions of this article; or a sheriff, keeper of a jail, assistant-keeper, or an officer, or person employed in or about a jail, who knowingly suffers liquor or wine to be sold or used therein, contrary to this article, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

Service of papers on prisoner.

§ 131. A sheriff or jailor, upon whom a paper in an action or special proceeding, directed to a prisoner in his custody, is lawfully served, or to whom such a paper is delivered for a prisoner, must, within two days thereafter, deliver the same to the prisoner, with a note thereon of the time of the service thereof upon, or the receipt thereof by him.

ARTICLE FOURTH.

JAIL LIBERTIES; ESCAPES.

SECTION 145. Jail liberties in certain counties.
146. Id.; in other counties.
147. Id.; how laid out.
148. Copy to be kept posted in jail.
149. Who admitted to liberties.
150. Bond to be executed by prisoner; its contents.
151. For whom bond to be held.
152. Prisoner to be committed when surety is insufficient
153. Surrender of prisoner by his sureties.
154. How surrender made.
155. What deemed and what not deemed an escape.
156. When court may order prisoner out of sheriff's custody.
157. Prisoners committed for contempt.
158. Sheriff's liability for escape.
159. Penalty for connivance at escape by a sheriff, etc.

Jail liberties in certain counties.

§ 145. The following are the liberties of the jail for each of the counties specified, to wit:

For the city and county of New-York, the whole of that city and county.

For the county of Onondaga, the whole of the city of Syracuse.

For the county of Monroe, the whole of the city of Rochester.

For the county of Erie, the whole of the city of Buffalo.

For the county of Dutchess, the whole of the city of Poughkeepsie.

For the county of Kings, the whole of that county.

For the county of Albany, the whole of the city of Albany.

For the county of Jefferson, the whole of the city of Watertown.

For the county of Herkimer, the whole of the village of Herkimer.

For the county of Rensselaer, the whole of the city of Troy

Id.; in other counties.

§ 146. The liberties of the jail in each of the other counties of the State, as heretofore established, shall continue to be the liberties thereof, until they are altered, or new liberties are established, as prescribed by law.

Id.; how laid out.

§ 147. Where the liberties of a jail are altered or established, by resolution of the board of supervisors, as prescribed by law, a space of ground, adjacent to the jail, and not exceeding five hundred acres in quantity, must be laid out as the jail liberties, in a square or rectangle as nearly as may be; but a stream of water, canal, street, or highway, may be adopted as an exterior line, notwithstanding it is not in a straight line, or is not at right angles with the other exterior lines of the liberties. A resolution establishing or altering jail liberties, must contain a particular description of their boundaries; and as soon as may be after its adoption, the boundaries must be designated by monuments, inclosures, posts, or other visible and permanent marks, at the expense of the county.

Copy to be kept posted in jail.

§ 148. The county clerk must, within one week after a resolution of the board of supervisors, establishing or altering jail liberties, has been filed in his office, deliver an exemplified copy thereof to the keeper of the jail, who must keep the same exposed to public view, in an open and public part of the jail, and exhibit it to each person admitted to the liberties of the jail, at the time of his executing a bond for that purpose.

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Who admitted to liberties.

§ 149. A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail upon executing a bond to the sheriff, as prescribed in the next section.

Bond to be executed by prisoner; its contents.

§ 150. The bond must be executed by the prisoner and one or more sufficient sureties, residents and householders or freeholders of the county, in a penalty at least twice the sum in which the sheriff was required to hold the defendant to bail, if he is in custody under an order of arrest, or has been surrendered in exoneration of his bail, before judgment; or directed to be collected by the execution, if he is in custody under an execution; or remaining uncollected upon a judgment against him, if he has been surrendered after judgment; conditioned that the person so in custody shall remain a prisoner, and shall not, at any time or in any manner, escape or go without the liberties of the jail until discharged by due course of law.

For whom bond to be held.

§ 151. A bond so taken is held for the indemnity of the sheriff taking it, and of the party at whose instance the prisoner executing it is confined.

Prisoner to be committed when surety is insufficient.

§ 152. If a sheriff, who has taken such a bond, discovers that a surety therein is insufficient, he may commit the prisoner who executed it to close confinement in the jail, until another bond, with good and sufficient sureties, is offered.

Surrender of prisoner by his sureties.

§ 153. One or more of the sureties, in a bond given for the liberties of a jail, may surrender the principal, at any time before judgment is rendered against them in an action on the bond; but they are not exonerated thereby, from a liability incurred before making the surrender.

How surrender made.

§ 154. The surrender must he made as follows. The surety or sureties making it must take the principal to the keeper of the jail, who must, upon his or their written requisition to that effect, take the principal into his custody, and indorse upon the bond given for the liberties, an acknowledgment of the surrender; and also, if required, give the surety or sureties a certificate, acknowledging the surrender.

What deemed and what not deemed an escape.

§ 155. The going at large, within the liberties of the jail in which he is in custody, of a prisoner who has executed such a bond, or of a prisoner who would be entitled to the liberties upon executing such a bond, is not an escape. But the going at large, beyond the liberties, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape; and the sheriff in whose custody he was, has the same authority to pursue and retake him, as if he had escaped from the jail. Such an escape forfeits the bond for the liberties, if any; subject to the provisions of the next article of this title.

When court may order indicted prisoner to be produced.

§ 156. Where a person, who has been indicted for a criminal offence, is held by a sheriff, by virtue of a mandate in a civil action or special proceeding, the court, in which the indictment is pending, may make an order, requiring the sheriff to bring him before the court; whereupon the court may make such disposition of the prisoner, as to it seems proper. The sheriff's fees and expenses, in so doing, are a county charge of the county wherein the court is sitting.

Prisoner committed for contempt.

§ 157. A prisoner, committed to jail upon process for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail, until he is discharged by due course of law, or is removed to another jail or place of confinement, in a case prescribed by law. A sheriff or keeper of a jail, who suffers

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such a prisoner to go or be at large out of his jail, except by virtue of a writ of habeas corpus, or by the special direction of the court committing him, or in a case specially prescribed by law; is liable to the party aggrieved, for his damages sustained thereby, and is guilty of a misdemeanor. If the commitment was for the non-payment of a sum of money, the amount thereof, with interest, is the measure of damages.

Sheriff's liability for escape.

§ 158. Where a prisoner, in a sheriff's custody, goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor, in an action against him, as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.

Penalty for connivance at escape, by a sheriff, etc.

§ 159. A sheriff or other officer, who demands or receives a reward, gratuity, or other valuable thing, to procure, assist, connive at, or permit an escape of a prisoner, in his custody, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office, and disqualifies him forever thereafter from holding the same.

ARTICLE FIFTH.

Action upon and Assignment of a Bond for Jail Liberties.

Section 160. Defence in action by sheriff on bond.
161. Judgment against sheriff to be evidenced against sureties, etc.
162. Summary judgment for sheriff.
163. Requisites of application therefor.
164. Such judgment when stayed. Same; when vacated.
165. Judgment against sheriff is evidence of damages.
166. Assignment of bond.
167. Action on bond by assignee; damages recoverable.
168. Such assignment bars action against sheriff.
169. Defence in action by assignee.
170. Stay of proceedings where assignment is not taken.
171. Defence of sheriff in action for escape.

Defence in action by sheriff on bond.

§ 160. In an action brought by a sheriff on a bond for the jail liberties, it is a defence, that the prisoner voluntarily returned to the liberties of the jail from which he escaped, or was recaptured by, or surrendered to the sheriff, from whose custody he escaped, before the commencement of the action. The defendants may make that or any other defence to the action, which might be made by the sheriff, to an action against him for the escape.

Judgment against sheriff to be evidence against sureties, etc.

§ 161. But if judgment has been rendered against the sheriff, in an action brought for the escape, and due notice of the pendency of the action was given to the prisoner and his sureties, to enable them to defend the same, the judgment against the sheriff is conclusive evidence of his right to recover against the prisoner and his sureties, to whom the notice was given, as to any matter which was or might have been controverted, in the action against the sheriff.

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Summary judgment for sheriff.

§ 162. In an action brought by a sheriff on a bond for the jail liberties, if it appears to the court, upon a motion made in behalf of the sheriff, that judgment has been rendered against him, for the escape of the prisoner, and that due notice of the pendency of the action against him, was given to the prisoner and his sureties, to enable them to defend the same, the court must order a summary judgment for the plaintiff; and judgment must be entered accordingly, with costs.

Requisites of application therefor.

§ 163. But to entitle a sheriff to move for such a judgment, he must have served a copy of his complaint, and given twenty days' notice of the motion.

Such judgment when stayed. Id.; when vacated.

§ 164. If it appears, on the hearing of the motion, that the defendants have a meritorious defence, which was not controverted in the action against the sheriff, and which by law could not have been so controverted, the court may stay proceedings on the judgment, with such limitations and upon such terms, as it deems just, until a trial in the action; but the judgment must stand as a security for the sheriff. If the defence is established, the court must vacate the judgment, and render judgment for the defendant.

Judgment against sheriff is evidence of damages.

§ 165. In an action brought by a sheriff on a bond for the jail liberties, a judgment against him for the escape of the prisoner, is evidence of the damages sustained by him, as if it had been collected; and he may recover his reasonable attorney's and counsel fees, and other expenses in defending the action against him, as part of his damages.

Assignment of bond.

§ 166. If a bond for the jail liberties is forfeited, the party at whose instance the prisoner was confined, or, in case of his death, his executor or administrator, is entitled to an assignment thereof; which must be executed by the sheriff who took the bond, or, in case of a vacancy in his office, by his under-sheriff, and acknowledged or proved, and certified, in like manner as a deed to be recorded in the county.

Action on bond by assignee; damages recoverable.

§ 167. The person to whom such an assignment has been made, may maintain an action on the bond, as assignee of the sheriff taking the same, in a case where an action might be maintained by the sheriff; and he may recover the same damages for the breach of the condition, which he might have recovered in an action against the sheriff, for the escape.

Such assignment bars action against sheriff.

§ 168. The acceptance of an assignment of such a bond, is a bar to an action, by or in behalf of the assignee, against the sheriff or other officer making the same, for an escape by the prisoner executing the bond, amounting to a breach of the condition thereof, unless the escape was with the assent of the sheriff or other officer.

Defence in action by assignee.

§ 169. In an action brought by the assignee of the bond, the defendant may make any defence, which he might make, if the action was brought in the name and for the benefit of the sheriff.

Stay of proceedings where assignment is not taken.

§ 170. If the person entitled to an assignment of a bond for the jail liberties, in lieu of taking the same, brings an action against the sheriff for the escape, the court may, except where the escape was made with the sheriff's assent, stay proceedings upon a judgment recovered against the sheriff, with such limitations and upon such terms as it deems just, until he has had a reasonable time to prosecute the bond, and collect a judgment recovered thereon.

Defence of sheriff in action for escape.

§ 171. In an action against a sheriff or other officer, for the escape of a prisoner, it is a defence, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return, or by recapture.

TITLE III.

Application of the foregoing provisions to the proceedings of a coroner.

SECTION 172. Duties of coroner when sheriff is a party.
173. Any one of the coroners may act.
174. Arrest of sheriff by coroner.
175. Sheriff; how confined.
176. Place of confinement to be deemed a jail.
177. Sheriff to be admitted to jail liberties; liability of coroner for sheriff's escape.
178. Coroner may prosecute, etc., bond for liberties.
179. Duties of coroner where sheriff is plaintiff.
180. Such prisoner entitled to jail liberties, etc.
181. Escape of such prisoner.

Duties of coroner when sheriff is a party.

§ 172. In an action or special proceeding, to which the sheriff of a county is a party, a coroner of the same county has all the power, and is subject to all the duties of a sheriff, in a cause to which the sheriff is not a party; except as otherwise specially prescribed by law.

Any one of the coroners may act.

§ 173. A mandate in a civil action or special proceeding which must or may be executed by the coroners, or by a coroner of a county, must be directed either to a particular coroner, or generally to the coroners of that county. Where such a mandate is directed generally to the coroners of a county, or requires them to do any act, it may be executed, and a return thereto may be made and signed, by one of them; but such an act or return does not affect the others.

Arrest of sheriff by coroner.

§ 174. Where a mandate, requiring the arrest of the sheriff of the county, is directed to a coroner, he must execute the same in the manner prescribed by law, with respect to the execution of a similar mandate by a sheriff; and he is authorized to take an undertaking on the arrest, or a bond for the jail liberties, to himself, in his name of office, in a like case, and in like manner, and with like effect, as where such a bond or undertaking may be taken by a sheriff.

Sheriff; how confined.

§ 175. Where the actual confinement of a sheriff by a coroner, on a mandate, is required or authorized by law, he must be confined by the coroner, in a house situated within the liberties of the jail of the county, other than the sheriff's house, or the jail, in the same manner as a sheriff is required by law to confine a prisoner in the jail.

Place of confinement to be deemed a jail.

§ 176. That house thereupon becomes the jail of the county, for the use of the coroner; and each provision of law relating to the jail, or to an escape from the jail, applies thereto, while the sheriff is confined therein.

Sheriff to be admitted to jail liberties; liability of coroner for sheriff's escape.

§ 177. A sheriff so arrested must be admitted to the liberties of the jail of the county, in a like case, and upon executing a like bond to the coroner, as prescribed by law for a prisoner in the sheriff's custody. For an escape of the sheriff from the liberties, the coroner is liable, in the same manner, and to the same extent, as a sheriff for a similar escape; and he may make the same defence as a sheriff.

Coroner may prosecute, etc., bond for liberties.

§ 178. The coroner may prosecute a bond for the liberties taken by him, and is entitled to all the rights, and subject to all the liabilities, prescribed by law, with respect to a similar bond taken by a sheriff. The bond may be assigned by him, to the party at whose instance the sheriff was arrested; and the same proceedings may be had thereupon, as upon a bond taken and assigned by a sheriff, in a similar case.

Duties of coroner where sheriff is plaintiff.

§ 179. A person arrested by a coroner, in an action or special proceeding, in which the sheriff of the county is plaintiff, must be confined in the jail of the county, in a case where such a confinement is required or authorized by law; but the coroner is not liable for an escape of the prisoner from the jail, after he has been confined therein. A person so confined must be kept and treated, in all respects, like a prisoner confined by the sheriff.

Such prisoner entitled to jail liberties, etc.

§ 180. A person so arrested by a coroner, is entitled to be discharged, or to the liberties of the jail, as the case requires, upon giving a bond or an undertaking to the coroner, in the like manner, and in a like case, in which a person arrested by a sheriff would be entitled to be so discharged, or to the liberties. The bond or undertaking so given, must be in all respects similar to that required to be given to a sheriff; and it has the like effect, and may be assigned and proceeded upon in like manner.

Escape of such prisoner.

§ 181. A coroner is answerable for an escape of a prisoner, admitted by him to the liberties of the jail, in the same manner and to the same extent, as a sheriff, and may interpose a like defence.

TITLE IV.

Powers, duties and liabilities of an incoming and outgoing sheriff, respectively, touching the matters included in this chapter.

SECTION 182. Certificate to be furnished to new sheriff.
183. Powers of former sheriff; when to cease.
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189. Under-sheriff, etc., when to comply with foregoing provisions.

Certificate to be furnished to new sheriff.

§ 182. Where a new sheriff has been elected or appointed, and has qualified and given the security required by law, the clerk of the county must furnish to the new sheriff a certificate, under his hand and official seal, stating that the person so appointed or elected, has so qualified and given security.

Powers of former sheriff; when to cease.

§ 183. Upon the commencement of the new sheriff's term of office, and the service of the certificate on the former sheriff, the latter's powers as sheriff cease, except as otherwise expressly prescribed by law.

Jails, process, etc., to be delivered to new sheriff.

§ 184. Within ten days after the service of the certificate, upon the former sheriff, he must deliver to his successor:

1. The jail, or if there are two or more, the jails of the county, with all their appurtenances, and the property of the county therein.

2. All the prisoners then confined in the jail or jails.

3. All process, orders, commitments, and all other papers and documents, authorizing, or relating to the confinement or custody of a prisoner, or, if such a process, order, or commitment has been returned, a statement in writing of the contents thereof, and when and where it was returned.

TITLE 4.

4. All mandates, then in his hands, except such as he has fully executed, or has begun to execute, by the collection of money thereon, or by a seizure of or levy on money or other property, in pursuance thereof.

Former sheriff to execute instrument.

§ 185. At the time of the delivery, the former sheriff must execute an instrument, reciting the property, documents, and prisoners delivered, specifying particularly the process or other authority, by which each prisoner was committed and is detained, and whether the same has been returned or is delivered to the new sheriff. The instrument must be delivered to the new sheriff, who must acknowledge, in writing, upon a duplicate thereof, the receipt of the property, documents and prisoners, therein specified; and deliver such duplicate and acknowledgment to the former sheriff.

Former sheriff to execute certain process.

§ 186. Notwithstanding the election or appointment of a new sheriff, the former sheriff must return, in his own name, each mandate which he has fully executed; and must proceed with and complete the execution of each mandate which he has begun to execute, in the manner specified in subdivision fourth of the last section but one.

Certain orders to be delivered to and returned by new sheriff.

§ 187. Where a person, arrested by virtue of an order of arrest, is confined, either in jail, or to the liberties thereof, at the time of assigning and delivering the jail to the new sheriff, the order, if it is not then returnable, must be delivered to the new sheriff, and be returned by him at the return day thereof, with the proceedings of the former sheriff and of the new sheriff thereon.

Delivery of prisoners, process, etc., how enforced.

§ 188. If the former sheriff neglects or refuses to deliver to his successor, the jail, or any of the property, documents or prisoners in his charge, as prescribed in this title, his successor must, notwithstanding, take possession of the jail, and of the property of the county therein, and the custody of the prisoners therein confined, and proceed to compel the delivery of the documents withheld, as prescribed by law.

Under-sheriff, etc., when to comply with foregoing provisions.

§ 189. If, at the time when a new sheriff qualifies, and gives the security required by law, the office of the former sheriff is executed by his under-sheriff, or by a coroner of the county, or a person specially authorized for that purpose, he must comply with the provisions of this title, and perform the duties thereby required of the former sheriff.

CHAPTER III.

CIVIL JURISDICTION OF THE PRINCIPAL COURTS OF RECORD; ORGANIZATION, MEMBERS, AND OFFICERS THEREOF; DISTRIBUTION, AND DISPATCH OF BUSINESS THEREIN.

TITLE I.—THE COURT OF APPEALS.
TITLE II.—THE SUPREME COURT, INCLUDING THE CIRCUIT COURTS.
TITLE III.—THE SUPERIOR CITY COURTS.
TITLE IV.—THE MARINE COURT OF THE CITY OF NEW-YORK.
TITLE V.—THE COUNTY COURTS.

TITLE I.

The court of appeals.

ARTICLE 1. Jurisdiction, and mode of exercising the same; general powers; terms and sittings.
2. The clerk of the court.
3. The State reporter; publication and distribution of the reports.

ARTICLE FIRST.

JURISDICTION, AND MODE OF EXERCISING THE SAME; GENERAL POWERS; TERMS AND SITTINGS.

SECTION 190. Cases in which court of appeals has jurisdiction.
191. Exceptions and qualifications.
192. Appeals from certain orders, how heard.
193. Court may make rules.
194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.
195. Second and subsequent appeals.
196. Times and places of holding terms.
197. Court may be held in any building; adjournments.
198. Officers to be appointed by court.

§ 190. The court of appeals has exclusive jurisdiction to review, upon appeal, every actual determination, made at a general term, by the supreme court, or by either of the superior city courts, in either of the following cases, and no others: Cases in which court of appeals has jurisdiction.

1. Where a final judgment has been rendered, in an action commenced in either of those courts, or brought there from another court; and, upon such an appeal, to review an interlocutory judgment or intermediate order, involving the merits, and necessarily affecting the final judgment.

2. Where an order has been made in such an action, affecting a substantial right, and not resting in discretion, which either (first) in effect determines the action, and prevents a final judgment, or (second) discontinues the action, or (third) grants or refuses a new trial, or (fourth) strikes out a pleading, or part of a pleading, or (fifth) decides an interlocutory application, or a question of practice, or (sixth) determines a statutory provision of the State to be unconstitutional, and the determination appears from the reasons given for the decision, or is necessarily implied in the decision.

3. Where a final order, affecting a substantial right, has been made in a special proceeding, or upon a summary application in an action, after judgment; and, upon such an appeal, to review any intermediate order, involving the merits, and necessarily affecting the order appealed from.

Exceptions and qualifications.

§ 191. But the jurisdiction, conferred by the last section, is subject to the following limitations, exceptions, and conditions:

1. An appeal cannot be taken, from an order granting a new trial, on a case or exceptions, unless the notice of appeal contains an assent, on the part of the appellant, that if the order is affirmed, judgment absolute shall be rendered against the appellant.

2. An appeal cannot be taken, in an action commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in a district court of that city, or in the city court of Yonkers, or in a justices' court of a city, unless the court below allows the appeal, by an order made at the general term which rendered the determination, or at the next general term after judgment is entered thereupon. An action discontinued because the answer set forth matter showing that the title to real property came in question, and afterwards prosecuted in another court, is not deemed to have been commenced in the court wherein the answer was interposed, within the meaning of this subdivision.

3. An appeal cannot be taken from a judgment, or from an order granting or refusing a new trial, except in an action or special proceeding affecting the title to real property, or an interest therein, if the matter in controversy, excluding costs, is less than five hundred dollars; unless the court below, by an order made at the general term which rendered the determination, or at the next general term after judgment is entered thereupon, allows the appeal, on the ground that a question of law is involved, which ought to be reviewed by the court of appeals.

If an appeal is taken, by the plaintiff, from a judgment rendered in an action not founded upon a contract, the sum for which the complaint demands judgment, or, if the action is to recover one or more chattels, the value of the chattels, as stated in the complaint, is deemed to be the amount of the matter in controversy, within the last subdivision, unless the defendant has interposed a counterclaim; in which case the counterclaim must be included, in determining the amount in controversy.

Appeals from certain orders, how heard.

§ 192. An appeal from an order, under subdivision second of the last section but one, except an order which in effect determines the action and prevents a final judgment, or discontinues the action, or grants or refuses a new trial upon a case or exceptions, may be noticed for hearing on a motion day, and heard as a motion.

Court may make rules.

§ 193. The court may from time to time make, alter, and amend,

rules, not inconsistent with the Constitution or statutes of the State, regulating the practice and proceedings in the court, and the admission of attorneys and counsellors at law, to practice in all the courts of record of the State.

Remittitur; when judgment absolute to be rendered, and proceedings thereupon.

§ 194. The judgment or order of the court of appeals must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, an assessment of damages, or any other proceeding, requisite to render the judgment effectual, may be had in the latter court.

Second and subsequent appeals.

§ 195. Upon a second and each subsequent appeal, including a case where a former appeal has been dismissed for a defect or irregularity, the time of filing the return, upon the first appeal, determines the place of the cause upon the calendar.

Times and places of holding terms.

§ 196. The terms of the court of appeals must be appointed to be held, at such times and places as the court thinks proper, and continued as long as the public interest requires.

Court may be held in any building; adjournments.

§ 197. A term of the court may be appointed to be held in a building, other than that designated by law for holding courts. A term may be adjourned from the place where it is appointed to be held, to another place in the same city. One or more of the judges may adjourn a term, without day, or to a day certain.

Officers to be appointed by court.

§ 198. The court may, from time to time, by an order entered in its minutes, appoint and remove its clerk, its reporter, and such attendants as it deems necessary.

ARTICLE SECOND.

THE CLERK OF THE COURT.

SECTION 199. Clerk of the court of appeals to give bond; rooms for his office.
200. To appoint a deputy. Powers of deputy.
201. May employ assistants in his office. Special deputy.
202. Is successor of former clerk of court of appeals.
203. Money in custody of clerk to be deposited in bank.
204. Clerk to report to court of appeals concerning money.
205. Amount deposited to be certified by cashier.
206. Court may order money to be invested; restrictions as to drawing money from bank.
207. Court may appoint person to examine accounts.
208. Court may make rules concerning money.

Clerk of the court of appeals to give bond; rooms for his office.

§ 199. The clerk of the court of appeals, before entering upon the duties of his office, must subscribe and file the Constitutional oath of office, and must execute and file in the Comptroller's office a bond to the people of the State, in the penalty of twenty-five thousand dollars, with two sufficient sureties, approved by the Comptroller and conditioned for the faithful performance of the duties of his office. If the bond is forfeited by a breach of its condition, the court of appeals must, by order, direct an action to be brought thereon. The money recovered must be applied, under the direction of the court of appeals, to indemnify the persons aggrieved by the breach, in proportion to their respective losses, and to make good any other loss, occasioned by the breach. The clerk must keep his office at the city of Albany, and the trustees

TITLE 1.

of the State Hall must assign him suitable rooms therein for that purpose.

To appoint a deputy. Powers of deputy.

§ 200. The clerk, by a writing, under his hand and the seal of the court, filed in his office, from time to time must appoint, and may at pleasure remove, a deputy-clerk, who is entitled to a salary, fixed and to be paid as prescribed by law. Before entering upon his duties, the deputy-clerk must subscribe and file in the clerk's office the Constitutional oath of office. While the clerk is absent from his office, or from the sitting of the court, or the office of clerk is vacant, the deputy-clerk has all the powers and is subject to all the duties of the clerk.

May employ assistants in his office. Special deputy.

§ 201. The clerk may, with the approbation of the* in writing of the judges of the court or a majority of them, employ as many assistants in his office as are necessary. He may from time to time appoint, and at pleasure remove, his assistants. Each assistant is entitled to a compensation, fixed and to be paid as prescribed by law. The clerk may appoint one of his assistants as special deputy-clerk; who possesses, in the absence of the clerk and the deputy-clerk, the same power and authority as the clerk at any sitting of the court which he attends, with respect to the business transacted thereat.

Is successor of former clerk of court of appeals.

§ 202. All money, stocks, securities, bonds, mortgages and other things in action, and other property, which were possessed by the last clerk of the court of appeals, elected by the people, by virtue of his office, have been transferred to, and have become possessed by and vested in, the clerk appointed by the court, as the successor in office of the last elected clerk, notwithstanding the change in the mode of appointment to the office and in the tenure thereof.

Money in custody of clerk to be deposited in bank.

§ 203. All money now in the custody or under the control of the clerk, and all other money which may hereafter be paid to or received by him on account of a fund, or in a cause, must be deposited, until invested as prescribed in this article, in such bank or banks as the court of appeals directs. Accounts thereof must be kept with the banks in manner and form as the court directs.

Clerk to report to court of appeals, concerning money.

§ 204. On the first Tuesday of January, and on the first Tuesday of July in each year, the clerk must transmit to the chief-judge a statement, verified by his affidavit, of all money then remaining in court or in his hands, which must specify:

1. The fund or the title of the cause in or on account of which each sum of money was paid.
2. The party by whom it was paid, and generally for what purpose.
3. The time of payment and the amount paid.
4. The bank in which it is deposited.

Amount deposited to be certified by cashier.

§ 205. The statement must be accompanied with a certificate of the cashier of each bank in which a deposit is stated to have been made, to the effect that the total amount stated to be deposited is actually in the bank, placed to the credit of the clerk, as clerk of the court of appeals, and not mingled with any other account.

Court may order money to be invested; restrictions as to drawing money from bank.

§ 206. The court may, by order, direct any portion of the money to be invested in the public debt of the State, or of the United States, or in approved interest-bearing mortgages upon real property. It may in like manner direct any sum of money, or any security, to be transferred or disposed of, as the court thinks proper. The clerk shall not invest any money, except pursuant to such a direction. Money deposited shall not be drawn from the bank, except on a check, signed by the clerk and countersigned by the chief-judge, or, in his absence, by an associate judge of the court.

* So in the original.

§ 207. The court may also, from time to time, appoint a suitable person to examine the accounts kept by, and the securities in the custody of the clerk, who shall be paid by the Comptroller for that service a reasonable sum, certified by the chief-judge. Court may appoint person to examine accounts.

§ 208. The court may also, from time to time, make such regulations concerning the money and securities specified in this article, making deposits, keeping accounts and drawing money, as it deems proper; but each regulation so made must be entered in the minutes. Court may make rules concerning money.

ARTICLE THIRD.

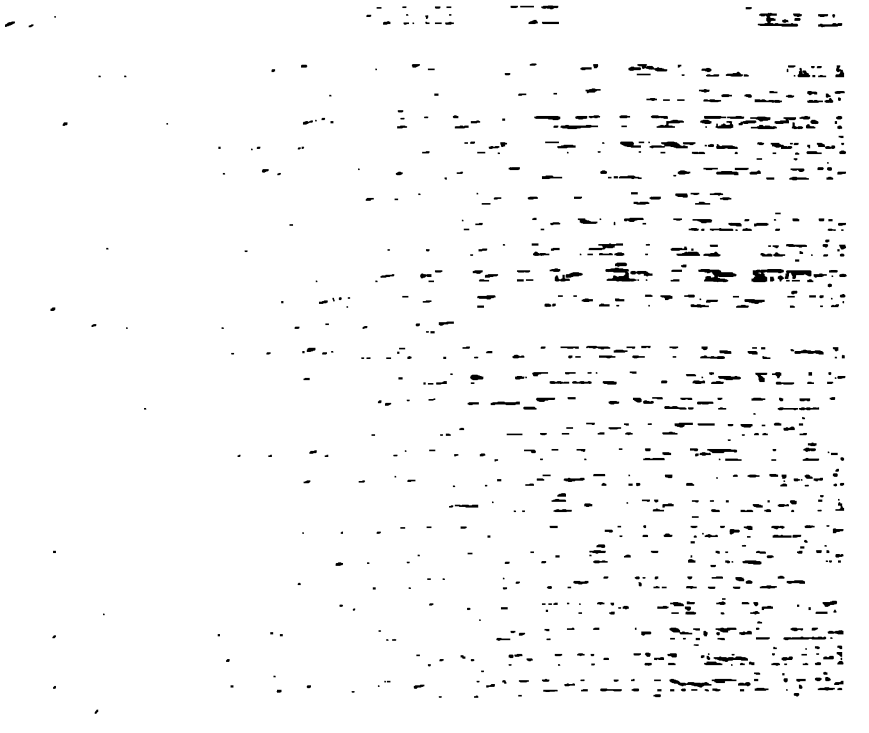
THE STATE REPORTER; PUBLICATION AND DISTRIBUTION OF THE REPORTS.

SECTION 209. State reporter is the reporter of court of appeals.
210. His duty.
211. Not to be interested in publication; contracts for publication.
212. Copyright of reports.
213. Secretary of State to distribute reports.
214. Unreported decisions, etc., to be delivered by reporter to successor.
215. Opinions, etc., not to be delivered, except, etc.
216. Certain opinions to be deposited with clerk.

§ 209. The reporter appointed by the court of appeals is styled the State reporter; and each provision of a statute, wherein the State reporter is mentioned, applies to the officer thus appointed. State reporter is the reporter of the court of appeals.

§ 210. The State reporter must report every cause, determined in the court of appeals, which the court directs him, or which the public interest, in his judgment, requires him to report. To enable him to perform that duty, the judges of the court must deliver to him the written opinions, rendered in each cause so determined. Each decision of the court, which is reported, must be so reported as soon as practicable after it is made; and if the reporter neglects faithfully to perform that duty, it is the duty of the court to remove him from office. His duty.

§ 211. The State reporter shall not have any pecuniary interest in the reports; but a contract for the publication thereof, under his supervision, must, from time to time, be made, in behalf of the people, by the State reporter, Secretary of State, and Comptroller, with the person or persons who agree to furnish to the Secretary of State, so many copies of each volume, as may be needed to enable him to comply with the next section but one; and also to publish and sell the reports, on terms the most advantageous to the public, regard being had to the proper execution of the work, and at a price not exceeding three dollars for a volume of not less than five hundred pages. Each contract, so entered into, must provide for the publication of the reports, for three years from the expiration of the time, specified for that purpose in the last contract. If the State reporter, Secretary of State, and Comptroller unite in determining, that a contract has not been faithfully kept by the person or persons agreeing so to publish the reports, they may, by an instrument in writing under their hands, filed in the office of the Secretary of State, annul the same from a time specified in the instrument; and thereupon they may enter into a new contract, for the publication of the reports, for three years from the time so specified. Before entering into a contract, the State reporter, Secretary of State, and Comptroller must advertise for, receive, and consider proposals for the publication of the reports. Not to be interested in publication; contracts for publication.



ARTICLE FIRST.

[illegible] Business [illegible] Miscellaneous [illegible]

[illegible] 1. [illegible]
2. [illegible] acts pending in other [illegible]
3. [illegible]
4. [illegible] act.
5. [illegible]
6. [illegible] one whose designation is revoked.
7. [illegible] Secretary of State.
8. Privileges and immunities of officers may not out of their departments.
9. Time and place of holding general terms; how appointed.
10. Appointments to be published.
11. Appointment may be made or filed after the prescribed time.
12. When a suitable person to preside, etc.
13. Justice in place of one disqualified.

ION 230. General term, held by two justices. Re-argument, etc.
231. When cause to be heard in another department.
232. Appointments of special terms, circuit courts, and courts of oyer and terminer.
233. Publication of appointments.
234. Governor may appoint extraordinary terms; justices to hold them.
235. General powers and duties of justices.
236. Governor may appoint in New York city, judge of other court to hold terms.
237. Governor to designate justices to hold courts in certain cases.
238. Place of holding the terms.
239. Special terms adjourned to chambers; trials thereat.
240. Judges of superior court of Buffalo may make orders.
241. What judges may perform duties of justice at chambers.
242. Officers required to attend general term. Sheriff's duty.
243. Fees of such officers; how paid.

General jurisdiction of supreme court.

217. The general jurisdiction in law and equity, which the supreme rt of the State possesses, under the provisions of the Constitution, udes all the jurisdiction, which was possessed and exercised by the reme court of the colony of New York, at any time, and by the rt of chancery in England, on the fourth day of July, seventeen dred and seventy-six; with the exceptions, additions, and limita- s, created and imposed by the Constitution and laws of the State. ject to those exceptions and limitations, the supreme court of the te has all the powers and authority of each of those courts, and rcises the same in like manner.

Supreme court may change place of trial of actions pending in other courts.

218. The supreme court, upon the application of either party, may, , in a proper case, must make an order, directing that an issue of , joined in an action or special proceeding, pending in any other rt of record, except a superior city court, the marine court of the city New-York, or a county court, be tried at a circuit court in another nty, on such terms, and under such regulations as it deems just; and 'eupon the issue must be tried accordingly. After the trial, the k of the county, in which it has taken place, must certify the min- thereof; which must be filed with the clerk of the court, in which action or special proceeding is pending. The subsequent proceed- s in the last mentioned court must be the same, as if the issue had n tried therein.

Judicial departments; general terms.

219. The departments, into which the State is divided, for the pur- es of organizing and holding general terms of the supreme court, styled, in this act, judicial departments. There is a general term he supreme court in each judicial department, composed of a pre- ng justice and two associate justices, designated from the whole ch of justices of the supreme court, as prescribed in the next two ions. The justices so designated are styled in this act, general n justices.

Presiding and associate justices, how long to act.

220. A presiding justice shall act as such, during his official term , justice of the supreme court, and an associate justice for five years n the thirty-first day of December, next after his designation; or il the earlier close of his official term. But the Governor may, at time, upon the written request of a general term justice, revoke designation.

Vacancies, how filled.

221. Within three months before a vacancy is to occur by lapse of e, or as soon after its occurrence as practicable, the Governor must gnate, from the whole bench of justices of the supreme court, ther presiding or associate justice, as the case requires. The person lesignated shall act as presiding or associate justice, for the period

TITLE 2.

specified in the last section. When a vacancy occurs, for any cause except lapse of time, the Governor must designate a presiding or associate justice, as the case requires. An associate justice, thus designated, shall act for his predecessor's unexpired time, or until the earlier close of his official term.

Assignment of duties to justice whose designation is revoked.

§ 222. Where the Governor revokes the designation of a general term justice, as prescribed in the last section but one, he may prescribe the duties to be performed by that justice, in holding court in any part of the State, from the time of such revocation until the taking effect of the next appointment of terms, as prescribed in section two hundred and thirty-two of this act, for the judicial department to which that justice belongs.

Designation, etc., to be filed with Secretary of State.

§ 223. A designation of a general term justice, or a revocation thereof, must be in writing, and filed in the office of the Secretary of State. The request of the justice whose designation is revoked, must be filed with the revocation.

Presiding and associate justices may act out of their departments.

§ 224. A presiding justice, designated for a judicial department, may preside at a general term, held in another department, if the presiding justice of that department is absent, or disqualified from acting; and an associate justice may act as such, at a general term held in another department, in place of an associate justice of that department, who is in like manner absent or disqualified.

Times and places of holding general terms; how appointed.

§ 225. On or before the first day of December, in the year eighteen hundred and seventy-eight, and each second year thereafter, the general term justices in each judicial department, or a majority of them, must appoint the times and places for holding the general terms of the supreme court, within their judicial department, for two years from the first day of January, of the year then next following. They must so designate at least one general term in each year, to be held in each of the judicial districts composing the department.

Appointment to be published.

§ 226. An appointment so made must be signed by the justices making it, and filed on or before the fifteenth day of December of the same year, in the office of the Secretary of State; who must immediately thereafter publish a copy thereof in the newspaper printed at Albany, in which legal notices are required to be published, at least once in each week, for four successive weeks. The expense of the publication is payable out of the treasury of the State.

Appointment may be made or filed after the prescribed time.

§ 227. If an appointment of general terms is not made or filed, before the expiration of the time specified therefor in the last two sections, it may be made or filed at the earliest convenient time thereafter; and the terms appointed thereby may be held pursuant to the same, after it has been published for the length of time, prescribed in the last section.

When associate justice to preside, etc.

§ 228. If a presiding justice is not present, at the time and place appointed for holding a general term, the associate justice present, having the shortest time to serve, or, if two are present, who have the same time to serve, the elder of them, must act as presiding justice, until a presiding justice attends. If only one general term justice is present, he may select one or two justices of the supreme court, to hold with him the general term, until two general term justices attend.

General term held by two justices.

§ 230. A general term may be held by two justices; and the concurrence of two justices is necessary to pronounce a decision. If two do not concur, a re-argument must be ordered.

Re-argument, etc.

§ 231. Where an order for a re-argument has been made, as prescribed in the last section, and one of the general term justices of that

When cause to be heard in another department.

judicial department is not qualified to sit in the cause, the order directing the re-argument may, in the discretion of the general term, direct it to take place, and the cause to be decided, in another judicial department, specified in the order. And where two of the general term justices, in a department, are not qualified to sit in a cause, to be heard at the general term of that department, an order may be made, upon notice, by the other general term justice, or at a special term of the court held in that department, directing that the cause be heard and decided in another judicial department, specified in the order. But this section does not prevent the cause from being heard and decided, in the same judicial department, by two qualified justices, if an order, directing the same to be heard and decided in another department, has not been made.

Appointments of special terms, circuit courts, and courts of oyer and terminer.

§ 232. On or before the first day of December, in the year eighteen hundred and seventy-seven, and every second year thereafter, the justices of the supreme court, for each judicial department, or a majority of them, must appoint the times and places for holding the special terms of the supreme court, and terms of the circuit courts and courts of oyer and terminer, within their department, for two years from the first day of January of the year next following. If, for any reason, such an appointment is not made before the expiration of the time so specified, it must be made at the earliest convenient time thereafter. At least one special term of the supreme court, and two terms of the circuit court, and of the court of oyer and terminer, must be appointed to be held in each year, in each county separately organized. Two or more terms of the circuit court may be appointed to be held, and may be held, at the same time, in the city and county of New York.

Publication of appointments.

§ 233. An appointment so made must be signed by the justices making it, and immediately filed in the office of the Secretary of State, who must publish a copy thereof in the newspaper, printed at Albany, in which legal notices are required to be published, at least once in each week, for three successive weeks, before the holding of a term in pursuance thereof. The expense of the publication is payable out of the treasury of the State.

Governor may appoint extraordinary terms; justices to hold them.

§ 234. The Governor may, when, in his opinion, the public interest so requires, appoint one or more extraordinary general or special terms of the supreme court, or terms of a circuit court, or court of oyer and terminer. He must designate the time and place of holding the same, and name the justice who shall hold, or preside at each term, except a general term; and he must give notice of the appointment, in such manner as, in his judgment, the public interest requires.

General powers and duties of justices.

§ 235. Any justice of the supreme court has power to sit at a general term, or to hold a special term of the supreme court, or a term of the circuit court, or to preside at a term of the court of oyer and terminer, for the whole or any portion of the term; and to act upon any business, which regularly comes before the term in which he is sitting; except where he is personally disqualified from sitting, in a particular action or special proceeding. Each justice must, at all reasonable times, when not engaged in holding court, transact such judicial business as may be done out of court.

Governor may appoint in New York city, judge of other court to hold terms.

§ 236. The Governor may, when in his opinion, the public interest so requires, designate one or more judges of the superior court of the city of New York, or of the court of common pleas for the city and county of New York, to hold terms of the circuit court, and special terms of the supreme court, in that city. The designation must be in

TITLE 2.

Copyright of reports.

§ 212. Neither the State reporter nor any other person shall obtain a copyright for the opinions contained in the reports; and the same may be published by any person. But the copyright of the statements of facts, of the head-notes, and of all other notes or references, prepared by the State reporter, must be taken by, and shall be vested in the Secretary of State, for the benefit of the people of the State.

Secretary of State to distribute reports.

§ 213. Of the copies of each volume of the reports, furnished to the Secretary of State, he must deliver one to the clerk of each county, for the use of the county, and deposit one in the office of the attorney-general, one with the clerk of the court of appeals, for the use of that court, and three in the State library.

Unreported decisions, etc., to be delivered by reporter to successor.

§ 214. A State reporter must, on the appointment of his successor, deliver to him all papers in his hands, pertaining to a cause which he has not reported, or which are not necessary to be retained by him, to complete the publication of a volume, which is then partly printed.

Opinions, etc., not to be delivered, except, etc.

§ 215. A State reporter, after the expiration of his term of office, shall not deliver a paper specified in the last section, or a copy thereof, to any person other than his successor in office, or the publisher of a partly printed volume; except that a copy of such a paper may be furnished by him, during a vacancy in the office, to a judge of the court, or to the attorney for a party to the cause to which it relates.

Certain opinions to be deposited with clerk.

§ 216. The State reporter must deposit with the clerk of the court, all opinions delivered to him, which are not to be reported, immediately after the publication of the reports of the other cases, decided at the same time. They must be properly filed and preserved, by the clerk.

TITLE II.

The supreme court, including the circuit courts.

ARTICLE 1. Jurisdiction and powers; designations of terms; distribution of business among the terms and judges; attendants upon the sittings; miscellaneous provisions.
2. The supreme court reporter.
3. Stenographers.

ARTICLE FIRST.

JURISDICTION AND POWERS; DESIGNATION OF TERMS; DISTRIBUTION OF BUSINESS AMONG THE TERMS AND JUDGES; ATTENDANTS UPON THE SITTINGS; MISCELLANEOUS PROVISIONS.

SECTION 217. General jurisdiction of supreme court.
218. Supreme court may change place of trial of actions pending in other courts.
219. Judicial departments; general terms.
220. Presiding and associate justices; how long to act.
221. Vacancies; how filled.
222. Assignment of duties to justice whose designation is revoked.
223. Designation, etc., to be filed with Secretary of State.
224. Presiding and associate justices may act out of their departments.
225. Times and places of holding general terms; how appointed.
226. Appointment to be published.
227. Appointment may be made or filed after the prescribed time.
228. When associate justice to preside, etc.
*229. Justice in place of one disqualified.

*Stricken out.

SECTION 230. General term, held by two justices. Re-argument, etc.
231. When cause to be heard in another department.
232. Appointments of special terms, circuit courts, and courts of oyer and terminer.
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234. Governor may appoint extraordinary terms; justices to hold them.
235. General powers and duties of justices.
236. Governor may appoint in New York city, judge of other court to hold terms.
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239. Special terms adjourned to chambers; trials thereat.
240. Judges of superior court of Buffalo may make orders.
241. What judges may perform duties of justice at chambers.
242. Officers required to attend general term. Sheriff's duty.
243. Fees of such officers; how paid.

General jurisdiction of supreme court.

§ 217. The general jurisdiction in law and equity, which the supreme court of the State possesses, under the provisions of the Constitution, includes all the jurisdiction, which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the fourth day of July, seventeen hundred and seventy-six; with the exceptions, additions, and limitations, created and imposed by the Constitution and laws of the State. Subject to those exceptions and limitations, the supreme court of the State has all the powers and authority of each of those courts, and exercises the same in like manner.

Supreme court may change place of trial of actions pending in other courts.

§ 218. The supreme court, upon the application of either party, may, and, in a proper case, must make an order, directing that an issue of fact, joined in an action or special proceeding, pending in any other court of record, except a superior city court, the marine court of the city of New-York, or a county court, be tried at a circuit court in another county, on such terms, and under such regulations as it deems just; and thereupon the issue must be tried accordingly. After the trial, the clerk of the county, in which it has taken place, must certify the minutes thereof; which must be filed with the clerk of the court, in which the action or special proceeding is pending. The subsequent proceedings in the last mentioned court must be the same, as if the issue had been tried therein.

Judicial departments; general terms.

§ 219. The departments, into which the State is divided, for the purposes of organizing and holding general terms of the supreme court, are styled, in this act, judicial departments. There is a general term of the supreme court in each judicial department, composed of a presiding justice and two associate justices, designated from the whole bench of justices of the supreme court, as prescribed in the next two sections. The justices so designated are styled in this act, general term justices.

Presiding and associate justices; how long to act.

§ 220. A presiding justice shall act as such, during his official term as a justice of the supreme court, and an associate justice for five years from the thirty-first day of December, next after his designation; or until the earlier close of his official term. But the Governor may, at any time, upon the written request of a general term justice, revoke his designation.

Vacancies; how filled.

§ 221. Within three months before a vacancy is to occur by lapse of time, or as soon after its occurrence as practicable, the Governor must designate, from the whole bench of justices of the supreme court, another presiding or associate justice, as the case requires. The person so designated shall act as presiding or associate justice, for the period

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specified in the last section. When a vacancy occurs, for any cause except lapse of time, the Governor must designate a presiding or associate justice, as the case requires. An associate justice, thus designated, shall act for his predecessor's unexpired time, or until the earlier close of his official term.

Assignment of duties to justice whose designation is revoked.

§ 222. Where the Governor revokes the designation of a general term justice, as prescribed in the last section but one, he may prescribe the duties to be performed by that justice, in holding court in any part of the State, from the time of such revocation until the taking effect of the next appointment of terms, as prescribed in section two hundred and thirty-two of this act, for the judicial department to which that justice belongs.

Designation, etc., to be filed with Secretary of State.

§ 223. A designation of a general term justice, or a revocation thereof, must be in writing, and filed in the office of the Secretary of State. The request of the justice whose designation is revoked, must be filed with the revocation.

Presiding and associate justices may act out of their departments.

§ 224. A presiding justice, designated for a judicial department, may preside at a general term, held in another department, if the presiding justice of that department is absent, or disqualified from acting; and an associate justice may act as such, at a general term held in another department, in place of an associate justice of that department, who is in like manner absent or disqualified.

Times and places of holding general terms; how appointed.

§ 225. On or before the first day of December, in the year eighteen hundred and seventy-eight, and each second year thereafter, the general term justices in each judicial department, or a majority of them, must appoint the times and places for holding the general terms of the supreme court, within their judicial department, for two years from the first day of January, of the year then next following. They must so designate at least one general term in each year, to be held in each of the judicial districts composing the department.

Appointment to be published.

§ 226. An appointment so made must be signed by the justices making it, and filed on or before the fifteenth day of December of the same year, in the office of the Secretary of State; who must immediately thereafter publish a copy thereof in the newspaper printed at Albany, in which legal notices are required to be published, at least once in each week, for four successive weeks. The expense of the publication is payable out of the treasury of the State.

Appointment may be made or filed after the prescribed time.

§ 227. If an appointment of general terms is not made or filed, before the expiration of the time specified therefor in the last two sections, it may be made or filed at the earliest convenient time thereafter; and the terms appointed thereby may be held pursuant to the same, after it has been published for the length of time, prescribed in the last section.

When associate justice to preside, etc.

§ 228. If a presiding justice is not present, at the time and place appointed for holding a general term, the associate justice present, having the shortest time to serve, or, if two are present, who have the same time to serve, the elder of them, must act as presiding justice, until a presiding justice attends. If only one general term justice is present, he may select one or two justices of the supreme court, to hold with him the general term, until two general term justices attend.

General term held by two justices.

§ 230. A general term may be held by two justices; and the concurrence of two justices is necessary to pronounce a decision. If two do not concur, a re-argument must be ordered.

Re-argument, etc.

§ 231. Where an order for a re-argument has been made, as prescribed in the last section, and one of the general term justices of that

judicial department is not qualified to sit in the cause, the order directing the re-argument may, in the discretion of the general term, direct it to take place, and the cause to be decided, in another judicial department, specified in the order. And where two of the general term justices, in a department, are not qualified to sit in a cause, to be heard at the general term of that department, an order may be made, upon notice, by the other general term justice, or at a special term of the court held in that department, directing that the cause be heard and decided in another judicial department, specified in the order. But this section does not prevent the cause from being heard and decided, in the same judicial department, by two qualified justices, if an order, directing the same to be heard and decided in another department, has not been made. When cause to be heard in another department.

§ 232. On or before the first day of December, in the year eighteen hundred and seventy-seven, and every second year thereafter, the justices of the supreme court, for each judicial department, or a majority of them, must appoint the times and places for holding the special terms of the supreme court, and terms of the circuit courts and courts of oyer and terminer, within their department, for two years from the first day of January of the year next following. If, for any reason, such an appointment is not made before the expiration of the time so specified, it must be made at the earliest convenient time thereafter. At least one special term of the supreme court, and two terms of the circuit court, and of the court of oyer and terminer, must be appointed to be held in each year, in each county separately organized. Two or more terms of the circuit court may be appointed to be held, and may be held, at the same time, in the city and county of New York. Appointments of special terms, circuit courts, and courts of oyer and terminer.

§ 233. An appointment so made must be signed by the justices making it, and immediately filed in the office of the Secretary of State, who must publish a copy thereof in the newspaper, printed at Albany, in which legal notices are required to be published, at least once in each week, for three successive weeks, before the holding of a term in pursuance thereof. The expense of the publication is payable out of the treasury of the State. Publication of appointments.

§ 234. The Governor may, when, in his opinion, the public interest so requires, appoint one or more extraordinary general or special terms of the supreme court, or terms of a circuit court, or court of oyer and terminer. He must designate the time and place of holding the same, and name the justice who shall hold, or preside at each term, except a general term; and he must give notice of the appointment, in such manner as, in his judgment, the public interest requires. Governor may appoint extraordinary terms; justices to hold them.

§ 235. Any justice of the supreme court has power to sit at a general term, or to hold a special term of the supreme court, or a term of the circuit court, or to preside at a term of the court of oyer and terminer, for the whole or any portion of the term; and to act upon any business, which regularly comes before the term in which he is sitting; except where he is personally disqualified from sitting, in a particular action or special proceeding. Each justice must, at all reasonable times, when not engaged in holding court, transact such judicial business as may be done out of court. General powers and duties of justices.

§ 236. The Governor may, when in his opinion, the public interest so requires, designate one or more judges of the superior court of the city of New York, or of the court of common pleas for the city and county of New York, to hold terms of the circuit court, and special terms of the supreme court, in that city. The designation must be in Governor may appoint in New York city, judge of other court to hold terms.

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hold terms. writing, and must specify each term, and the judge designated to hold the same. A case or exceptions, in a cause tried at such a term, must be settled before the judge who held the same.

Governor to designate justices to hold courts in certain cases.

§ 237. If a general or special term of the supreme court, or a term of the circuit court, or court of oyer and terminer, duly appointed, is in danger of failing, the Governor may designate one or more justices of the supreme court, as the case requires, to preside at the term of the court of oyer and terminer, or to hold the term of the supreme court, or circuit court, in the absence of the justice or justices appointed to preside at or hold the same.

Place of holding the terms.

§ 238. The place appointed within each county, for holding a special term of the supreme court, at which issues of fact are triable, or a term of the circuit court, or court of oyer and terminer, must be that designated by statute, for holding the county or circuit court.

Special terms adjourned to chambers; trials thereat.

§ 239. A special term of the supreme court may be adjourned to a future day, and to the chambers of any justice of the court, residing within the judicial district, by an entry in the minutes; and then adjourned from time to time, as the justice holding the same directs. An action triable by the court, without a jury, which was upon the calendar of the term before it was adjourned, may be tried at a term so adjourned, and held at chambers, by consent of both parties, but not otherwise. In that case, the attendance of the clerk, the sheriff, the crier, or a constable, is not required, unless the justice directs one or more of those officers to attend.

Judges of superior court of Buffalo may make orders.

§ 240. Each judge of the superior court of Buffalo may, within that city, make an order in an action or special proceeding, pending in the supreme court, which a justice of the supreme court may make, out of court.

What judges may perform duties of justice at chambers.

§ 241. A judge of a superior city court, within his city, and a county judge, within his county, possesses, and upon proper application must exercise, the power conferred by law, in general language, upon an officer authorized to perform the duties of a justice of the supreme court at chambers, or out of court.

Officers required to attend general term. Sheriff's duty.

§ 242. A general term must be attended by the sheriff of the county in which it is held, his under-sheriff, or one of his deputies; by two constables or police officers, notified by the sheriff; by a crier for courts within the county; and by the county clerk, or his deputy, or special deputy; all of whom must act under the direction of the court, or of the presiding justice. The sheriff of the county must cause the room in which the general term is held to be properly heated, ventilated, lighted and kept comfortably clean and in order. The court may enforce the performance of that duty by the sheriff. The sheriff must also provide the court with all necessary stationery, and minutes-books, upon the written requisition of the court or of the justice presiding at the term.

Fees of such officers; how paid.

§ 243. The fees of a crier, a sheriff, a constable, or a police officer, for attending a general term, and all expenses incurred by a sheriff, in obedience to the last section, must be audited by the Comptroller, and paid out of the treasury of the State. The fees and proper charges of the clerk, for services rendered at or preparatory to a general term, and not legally chargeable to an attorney or a party, are a county charge.

TITLE III.

The superior city courts.

ARTICLE 1. Provisions applicable to all the superior city courts.
2. Provisions exclusively applicable to the court of common pleas for the city and county of New-York, and the superior court of the city of New-York.
3. Provisions exclusively applicable to the superior court of Buffalo.
4. Provisions exclusively applicable to the city court of Brooklyn.

ARTICLE FIRST.

PROVISIONS APPLICABLE TO ALL THE SUPERIOR CITY COURTS.

SECTION 263. General jurisdiction of the superior city courts.
264. Domestic corporations, etc., when deemed residents, etc.
265. Where there are two or more defendants.
266. Jurisdiction to be presumed; want of jurisdiction matter of defence.
267. Jurisdiction, etc., to be co-extensive with that of supreme court.
268. Id.; in special proceedings out of court.
269. Actions, etc., may be removed into supreme court.
270. Where, and in what cases, order for removal to be granted.
271. Appeal from order of removal.
272. Order to stay proceedings to procure removal.
273. Removal to supreme court, when judges of city court cannot act.
274. Removal from supreme court to city court, by consent.
275. Duty of clerks when removal made.
276. Removal not to affect validity of former proceedings, etc.
277. When county judge may make order.
278. Power to send process to any county.
279. Proceedings commenced before one judge may be continued before another.
280. Appointment of terms, etc.
281. General terms by whom held, etc.
282. Id.; special and trial terms.
283. New records, etc., in place of those mutilated or injured.
284. Clerks and deputy-clerks.
285. Special deputy-clerks.

§ 263. The civil jurisdiction of each of the superior city courts extends to the following actions and special proceedings, in addition to the jurisdiction, power and authority conferred upon it, in a particular case, by special statutory provision: General jurisdiction of the superior city courts.

1. To an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment directing a conveyance of real property; and to every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real. But jurisdiction attaches under this subdivision only where the real property to which the action relates is situated within the city where the court is located.

2. To an action for any other cause, where the cause of action arose within that city; or where the defendant is a resident of that city; or where the summons is personally served upon the defendant therein; or where the action is brought to recover a penalty, or for any other

in session. Upon the certificates so furnished, the supreme court, at a special term thereof held within the judicial district, may, not oftener than once in six months, by order, apportion to each county in the district, such a proportion of the stenographer's salary, as the number of days during which one or more terms were in session in that county, bears to the whole number of days, during which the terms were in session in that district, since the last apportionment was made. Upon the presentation of a certified copy of such an order, each county treasurer must pay to the stenographer, from the court fund, or the fund from which jurors are paid, the sum so apportioned to his county.

Their expenses; how paid.

§ 260. Each of those stenographers is also entitled to payment of his actual and necessary expenses, while attending court, including stationery, and ten cents for each mile for his actual travel, between the place of holding each term and his residence, going and returning, or from term to term, as the case may be. The amount thereof must be certified by the judge holding or presiding at the term, and must be paid, upon his certificate, by the treasurer of the county where the term is held, from the court fund, or the fund from which jurors are paid. But mileage shall not be computed beyond the bounds of the judicial district, except where the usual line of travel, from one point to another within that district, passes partly through another judicial district.

Additional stenographer when two courts held at the same time.

§ 261. Where two or more terms, at which the stenographer would be required to attend, by the provisions of section two hundred and fifty-eight of this act, are appointed to be held at the same time, the justices of the supreme court, assigned to hold or preside at the same, may designate the term at which the stenographer for the district must attend, and may employ an additional stenographer to attend each other term. In that case, they must, by a certificate signed by them, fix a reasonable sum for the payment of his services and actual necessary expenses, to and from, and while attending the term. The sum so fixed must be paid by the treasurer of the county, upon the certificate, from the court fund, or the fund from which jurors are paid; and the number of days, during which that term was in session, shall not be taken into account, in making an apportionment of salary, as prescribed in section two hundred and fifty-nine of this act.

Temporary stenographer.

§ 262. Where an official stenographer, or his assistant, is not in attendance, at a term of the circuit court, or court of oyer and terminer or at a special term of the supreme court, where issues of fact are triable, the judge holding or presiding at the term, may, in his discretion employ a stenographer, who must be paid such a compensation, as the judge fixes by his certificate, not exceeding ten dollars for each day's attendance, and ten cents for each mile, for travel to and from his residence, to the place where the term is held, together with a reasonable sum for stationery. The sum so fixed is a charge upon the county in which the term is held, and the county treasurer must pay it, upon the judge's certificate, from the court fund, or the fund from which jurors are paid. If it was the duty of an official stenographer, or his assistant, to attend the term, and it does not appear to the satisfaction of the judge, that the failure to attend was excusable, the judge may in his discretion, during or after the adjournment of the term, make an order that the sum so paid, or any part thereof, be deducted from the salary of the official stenographer, and that the county have such credit therefor, as justice requires. Such an order may be revoked by the judge who made it, upon proof by affidavit, that the failure to attend was excusable.

TITLE III.

The superior city courts.

ARTICLE 1. Provisions applicable to all the superior city courts.
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ARTICLE FIRST.

PROVISIONS APPLICABLE TO ALL THE SUPERIOR CITY COURTS.

SECTION 263. General jurisdiction of the superior city courts.
264. Domestic corporations, etc., when deemed residents, etc.
265. Where there are two or more defendants.
266. Jurisdiction to be presumed; want of jurisdiction matter of defence.
267. Jurisdiction, etc., to be co-extensive with that of supreme court.
268. Id.; in special proceedings out of court.
269. Actions, etc., may be removed into supreme court.
270. Where, and in what cases, order for removal to be granted.
271. Appeal from order of removal.
272. Order to stay proceedings to procure removal.
273. Removal to supreme court, when judges of city court cannot act.
274. Removal from supreme court to city court, by consent.
275. Duty of clerks when removal made.
276. Removal not to affect validity of former proceedings, etc.
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278. Power to send process to any county.
279. Proceedings commenced before one judge may be continued before another.
280. Appointment of terms, etc.
281. General terms by whom held, etc.
282. Id.; special and trial terms.
283. New records, etc., in place of those mutilated or injured.
284. Clerks and deputy-clerks.
285. Special deputy-clerks.

General jurisdiction of the superior city courts.

§ 263. The civil jurisdiction of each of the superior city courts extends to the following actions and special proceedings, in addition to the jurisdiction, power and authority conferred upon it, in a particular case, by special statutory provision:

1. To an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment directing a conveyance of real property; and to every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real. But jurisdiction attaches under this subdivision only where the real property to which the action relates is situated within the city where the court is located.

2. To an action for any other cause, where the cause of action arose within that city; or where the defendant is a resident of that city; or where the summons is personally served upon the defendant therein; or where the action is brought to recover a penalty, or for any other

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supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme court. And each judge of the superior city court possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.

Id.; in special proceedings out of court.

§ 268. Each judge of a superior city court also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.

Actions, etc., may be removed into supreme court.

§ 269. The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action or a special proceeding pending in a superior city court, for the purpose of changing the place of trial or hearing thereof. Where an order for a removal is made, as prescribed in this section, the place of trial or hearing must be changed by the same order to another county. A certified copy of the order must be filed in the office of the clerk of the court, in which the action or special proceeding was commenced. Thereupon it is removed into the supreme court; and the subsequent proceedings therein must be the same, as if it had been originally brought in the supreme court.

Where and in what cases, order for removal to be granted.

§ 270. An order for the removal of an action or special proceeding, as prescribed in the last section, can be made only upon notice, and by a special term of the supreme court, where the motion might be made, if the action or special proceeding was pending in the supreme court, and brought in the county where the superior city court is located; and in a case, where an order, changing in like manner the place of trial or hearing, would be granted, if the action or special proceeding was pending in the supreme court.

Appeal from order of removal.

§ 271. An appeal from an order, made upon such a motion, must be taken and heard in like manner, as if the action or special proceeding was pending in the supreme court, and triable in the county from which the place of trial is changed. Such an appeal brings up to the general term, and thence to the court of appeals, if the order is appealable to that court, all questions which were before the special term, and the appellate tribunal must dispose of the same, as if they were originally presented to it.

Order to stay proceedings to procure removal.

§ 272. An order to stay proceedings, for the purpose of affording an opportunity to make such an application for removal, may be made by a judge, authorized to make an order to stay proceedings, either in the court where the action or special proceeding is pending, or in the supreme court, and with like effect, and under like circumstances.

Removal to supreme court, when judges of city court cannot act.

§ 273. If all the judges of a superior city court are, for any reason, incapable of sitting upon the trial of an action, or the hearing of a special proceeding pending therein, or if all, or all but one, of the judges of a superior city court are incapable of sitting upon the hearing of an appeal therein, the judges of the court, or a majority of them, must make and file in the office of the clerk of the court a certificate of the fact. Thereupon the action or special proceeding is removed to the supreme court; and the subsequent proceedings therein must be the same as if it had been originally brought in the supreme court.

Removal from supreme court to

§ 274. The supreme court, where the parties manifest in writing their consent, must make an order directing that an action or special proceeding, pending in that court and triable in a county where a

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Domestic corporations, etc., when deemed residents, etc.

§ 264. For the purpose of determining the jurisdiction of a superior city court, in a case specified in the last section, a domestic corporation or joint stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or is actually located, within the city wherein the court is located, is deemed a resident of that city; and personal service of a summons, made within that city, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within that city, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation, wherever it is located.

Where there are two or more defendants.

§ 265. Where an action or a special proceeding is brought against two or more parties, and the jurisdiction of a superior city court depends upon the residence of a party, within the city wherein the court is located; or personal service upon him, within that city, of the summons or the mandate for the commencement of the special proceeding; or the levying of a warrant of attachment within that city; and jurisdiction is thus acquired as against one or more, but not as against all of them, the jurisdiction, with respect to the others, is governed by the following rules:

1. Where the action or special proceeding is founded upon a contract, upon which two or more persons are jointly liable, and the court has or acquires jurisdiction thereof, as against one of them, it has jurisdiction thereof as against all the persons so jointly liable. But this subdivision does not extend to a case, where the liability is several, as well as joint.

2. Where an action or a special proceeding brought against a public officer, together with one or more private persons, is founded upon an official act or omission; or where an action or a special proceeding brought against a corporation, together with one or more natural persons, is founded upon an act or omission of the corporation; and the court has or acquires jurisdiction thereof, as against the public officer or the corporation; it has jurisdiction thereof as against all persons, who are necessary parties to the complete determination of the controversy.

3. Where it is not necessary to the complete determination of the controversy, that all the parties thereto should be subjected to the jurisdiction of the court, the action or special proceeding may be discontinued or dismissed, as to the parties over whom the court has not jurisdiction, and proceed as to the others, as if they were the only parties against whom it was brought.

Jurisdiction to be presumed; want of jurisdiction matter of defence.

§ 266. The jurisdiction of a superior city court, in an action or a special proceeding brought therein, must always be presumed. It is not necessary to set forth in a complaint in such an action, or in the petition or other statement of the case in such a special proceeding, any of the jurisdictional facts specified in section two hundred and sixty-three of this act; and where the defendant in the action, or the person against whom the special proceeding is instituted, appears, the want of jurisdiction, by reason of the non-existence of any of those facts, is matter of defence, and is waived by the appearance, unless it is pleaded in defence.

Jurisdiction, etc., to be coextensive with that of supreme court.

§ 267. Where a superior city court has jurisdiction of an action or special proceeding, it possesses the same jurisdiction, authority, and power, in and over the same, and in the course of the proceedings therein, which the supreme court possesses in a like case; and it may render any judgment, or grant either party any relief, which the

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supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme court. And each judge of the superior city court possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.

Id.; in special proceedings out of court.

§ 268. Each judge of a superior city court also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.

Actions, etc., may be removed into supreme court.

§ 269. The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action or a special proceeding pending in a superior city court, for the purpose of changing the place of trial or hearing thereof. Where an order for a removal is made, as prescribed in this section, the place of trial or hearing must be changed by the same order to another county. A certified copy of the order must be filed in the office of the clerk of the court, in which the action or special proceeding was commenced. Thereupon it is removed into the supreme court; and the subsequent proceedings therein must be the same, as if it had been originally brought in the supreme court.

Where and in what cases, order for removal to be granted.

§ 270. An order for the removal of an action or special proceeding, as prescribed in the last section, can be made only upon notice, and by a special term of the supreme court, where the motion might be made, if the action or special proceeding was pending in the supreme court, and brought in the county where the superior city court is located; and in a case, where an order, changing in like manner the place of trial or hearing, would be granted, if the action or special proceeding was pending in the supreme court.

Appeal from order of removal.

§ 271. An appeal from an order, made upon such a motion, must be taken and heard in like manner, as if the action or special proceeding was pending in the supreme court, and triable in the county from which the place of trial is changed. Such an appeal brings up to the general term, and thence to the court of appeals, if the order is appealable to that court, all questions which were before the special term, and the appellate tribunal must dispose of the same, as if they were originally presented to it.

Order to stay proceedings to procure removal.

§ 272. An order to stay proceedings, for the purpose of affording an opportunity to make such an application for removal, may be made by a judge, authorized to make an order to stay proceedings, either in the court where the action or special proceeding is pending, or in the supreme court, and with like effect, and under like circumstances.

Removal to supreme court, when judges of city court cannot act.

§ 273. If all the judges of a superior city court are, for any reason, incapable of sitting upon the trial of an action, or the hearing of a special proceeding pending therein, or if all, or all but one, of the judges of a superior city court are incapable of sitting upon the hearing of an appeal therein, the judges of the court, or a majority of them, must make and file in the office of the clerk of the court a certificate of the fact. Thereupon the action or special proceeding is removed to the supreme court; and the subsequent proceedings therein must be the same as if it had been originally brought in the supreme court.

Removal from supreme court to

§ 274. The supreme court, where the parties manifest in writing their consent, must make an order directing that an action or special proceeding, pending in that court and triable in a county where a

superior city court is located, be removed to the superior city court, or, in the city of New York, to either of those courts therein, as specified in the consent. A certified copy of the order must be filed in the office of the clerk of the court to which the action or special proceeding is ordered to be removed. Thereupon it is removed accordingly; and all subsequent proceedings therein must be the same as if it had been originally brought in the superior city court. city court, by consent.

§ 275. Where an action or special proceeding is removed from one court to another, as prescribed in this article, the clerk of the court from which it is removed must forthwith deliver to the clerk of the court to which it is removed all papers filed therein, and certified copies of all minutes and entries relating thereto, which must be filed, entered, or recorded, as the case requires, in the office of the last mentioned clerk. If the action or special proceeding is removed to the supreme court, and the place of trial or hearing changed, the delivery must be made to the clerk of the county in which the order of removal directs the trial or hearing to be had. Duty of clerks when removal made.

§ 276. The removal of an action or special proceeding, as prescribed in this article, does not invalidate or in any manner impair, a process, provisional remedy, or other proceeding, or a bond, undertaking, or recognizance, in the action or special proceeding so removed; each of which continues to have the same validity and effect as if the removal had not been made. Where bail has been given, the surrender of the defendant in the court to which the action or special proceeding was removed, has the same effect as a surrender in the court from which it was removed would have had if the action or special proceeding had remained therein. Removal not to affect validity of former proceedings, etc.

§ 277. In an action or special proceeding brought in a superior city court, an order may be made without notice, or an order to stay proceedings may be made upon notice by the county judge of the county where the court is situated, or of the county where the attorney for the applicant resides, in a case where a judge of the superior city court might make the same out of court, and with like effect. When county judge may make order.

§ 278. A superior city court has power, in an action or special proceeding of which it has jurisdiction, to send its process and other mandates into any county of the State, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court. Power to send process to any county.

§ 279. A special proceeding, instituted before a judge of the superior court of Buffalo, or the city court of Brooklyn, or a proceeding commenced before a judge of either of those courts, out of court, in an action or special proceeding pending in his court, may be continued, from time to time, before one or more other judges of the same court, as prescribed by law, with respect to like proceedings, before a judge of a court of record in the city of New York. Proceedings commenced before one judge may be continued before another.

§ 280. The judges of each superior city court, or a majority of them, must, from time to time, appoint the times for holding the general, special and trial terms of their court. They must also assign the judges to hold each of the terms, and designate the trial terms at which issues of fact are triable by a jury. A general, a special, and one or more trial terms, may be appointed to be held, and may be held, at the same time. The judges, or a majority of them, must also appoint reasonable times, when a judge must attend at chambers, and designate the judge to attend for that purpose. Each appointment, made as prescribed in this section, must be signed by the judges making the same, and filed in the clerk's office. A copy thereof must Appointment of terms, etc.

TITLE 3.

be published in the newspaper printed in Albany, in which legal notices are required to be published, and in two newspapers printed in the city where the court is located, at least once in each week for three successive weeks, before a term is held by virtue thereof.

General terms, by whom held, etc.

§ 281. A general term of a superior city court must be held by at least two judges. Two must concur to determine a cause; otherwise, it must be reheard; except that if the remaining judge or judges are disqualified to sit upon an appeal, the judgment or order appealed from must be affirmed, unless a rehearing is directed.

Id.; special and trial terms.

§ 282. A special term or a trial term of a superior city court must be held by one judge.

New records, etc., in place of those mutilated or injured.

§ 283. When the chief-judge of a superior city court certifies, that a book of minutes, records, indices, or dockets of judgments, in the office of the clerk of the court, has become so mutilated or injured, that it cannot be conveniently used or correctly examined, the clerk of the court must cause a copy thereof to be made. The expense of making the copy, not exceeding ten cents for each folio, is a charge, in the city of New York, upon that city, and, in the city of Buffalo, or the city of Brooklyn, upon the county where the court is located; and it must be paid by the comptroller of the city of New York, or the county treasurer, as the case requires, upon the certificate of the clerk, that the copy was made pursuant to his direction. The copy, when certified by the clerk to be a correct copy of the original, has, presumptively, the effect of the original. The original must be preserved, and may be referred to at any time, by the direction of a judge of the court.

Clerks and deputy clerks.

§ 284. Each superior city court has a clerk, who is appointed, and may be removed at pleasure, by the judges of the court, or a majority of them. Each clerk, by a writing under his hand and the seal of the court, filed in his office, must appoint, and may at pleasure remove, a deputy-clerk. The deputy-clerk has all the powers, and may perform all the duties of the clerk, when the office of clerk is vacant, or at the clerk's office, when the clerk is absent therefrom, or at a term or sitting of the court, which the deputy-clerk attends. Each clerk and each deputy-clerk must subscribe, and file in the clerk's office, the Constitutional oath of office; and is entitled to a salary, fixed and to be paid as prescribed by law.

Special deputy clerks.

§ 285. A special deputy-clerk of a superior city court, appointed as prescribed by law possesses the same powers as the clerk, at a sitting or term of the court which he attends, with respect to the business transacted thereat.

ARTICLE SECOND.

PROVISIONS EXCLUSIVELY APPLICABLE TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK, AND THE SUPERIOR COURT OF THE CITY OF NEW YORK.

SECTION 286. Special jurisdiction of the common pleas.
287. Each court to consist of six judges; chief-judge.
288. Assistance, etc., in clerks' offices.
289. Stenographers.
290. Stenographer for extra term.
291. Criers.

Special jurisdiction

§ 286. In addition to the jurisdiction defined in sections two hundred and sixty-three, two hundred and sixty-four and two hundred and

sixty-five of this act, the court of common pleas for the city and county of New York, has power and jurisdiction to vacate and set aside a judgment, entered in any court held within that city and county, upon a forfeited recognizance, upon the terms and conditions specially prescribed by law for that purpose; to remit a fine or forfeited recognizance, in a case where a county court can remit the same, and in like manner; and to entertain any special proceeding, which, in any county except New York, may be instituted in the county court. of the common pleas.

§ 287. The court of common pleas for the city and county of New York, and the superior court of the city of New York, consist of six judges for each court; one of whom must from time to time, as a vacancy occurs, be appointed chief judge of his court, as prescribed in the Constitution. Each court to consist of six judges; chief judge.

§ 288. The clerk of each of those courts may appoint and at pleasure remove, such special deputy-clerks and other assistants, as he deems necessary; but a special deputy-clerk or an assistant, so appointed, is not entitled to any compensation out of the treasury of the city of New York, unless his compensation is fixed by law, or allowed pursuant to law. Assistants, etc., in clerks' offices.

§ 289. The judges of each of those courts, or a majority of them, must appoint, and may at pleasure remove, a stenographer for each term of the court, for the trial of issues of fact, constituting a distinct part. Each stenographer so appointed is entitled to a salary, fixed and to be paid as prescribed by law. He must attend all the sittings of the part for which he is appointed. If the judge requires a copy of any proceedings, written out at length from the stenographic notes, he may make an order directing one-half of the stenographer's fees therefor, to be paid by each of the parties to the action or special proceeding, at the rate of ten cents for each folio so written out, and may enforce payment thereof. If there are two or more parties on the same side, the order may direct either of them to pay the sum payable by their side, for the stenographer's fees, or it may apportion the payment thereof among them, as the judge deems just. Stenographers.

§ 290. The judge who holds an extraordinary trial term of either of those courts, must appoint a stenographer for that term, who is subject to all the provisions of law relating to an assistant stenographer, and is entitled to a compensation, at the rate and in the manner prescribed by law for the official stenographer. Stenographer for extra term.

§ 291. The judges of each of those courts, or a majority of them, must appoint, and may at pleasure remove, one crier for their court. Each crier so appointed is entitled to a salary, fixed and to be paid as prescribed by law. He is not entitled to any other compensation. Criers.

ARTICLE THIRD.

PROVISIONS EXCLUSIVELY APPLICABLE TO THE SUPERIOR COURT OF BUFFALO.

SECTIONS 292. Additional jurisdiction.
293. Id.; in special proceedings.
294. Exclusive powers in certain cases.
295. Court to consist of three judges; chief-judge.
296. Number of general and trial terms.
297. Demurrers to be tried at general term.
298. Clerk may charge fees.

TITLE 3.

SECTION 299. Deputy-clerk and special deputy-clerk.
300. Stenographer.
301. Crier.
302. Sheriff, constables, etc., to attend court; special powers in contempt cases, etc.
303. Assessors to return jury list.
304. Drawing trial jurors.
305. Notifying trial jurors; their fees.
306. Additional jurors may be ordered.

Additional jurisdiction.

§ 292. In addition to the jurisdiction defined in sections two hundred and sixty-three, two hundred and sixty-four, and two hundred and sixty-five of this act, the jurisdiction of the superior court of Buffalo extends to the following actions and special proceedings:

1. To an action founded upon a contract, where the defendant, or, if there are two or more defendants, where either of them, is a resident of that city, or occupies a tenement, for the transaction of his or their ordinary business, in that city; or where the summons is served upon either of them in that city; or where the contract was made in that city.

2. To an action for any other cause, where the defendant, or, if there are two or more defendants, where all the defendants proceeded against, occupy a tenement in that city, for the transaction of their ordinary business.

3. To an action to recover damages against one or more common carriers, not being residents of the State, where the defendant, or, if there are two or more defendants jointly liable, where one of them has property in that city.

4. To an action against a domestic corporation, which transacts its general business in that city, or has an office or agency in that city, for the transaction of business; or against a foreign corporation, which has property in that city, or an agency therein.

5. To an action or special proceeding against the city of Buffalo, or an officer thereof.

Id. in special proceedings.

§ 293. The court also possesses and exercises, within the city of Buffalo, in any matter which arises, or the subject whereof is located or situated within that city, jurisdiction, power and authority, concurrent and co-extensive with those conferred upon the supreme court, in a like case, by any statutory provision.

Exclusive powers in certain cases.

§ 294. The court also possesses exclusive jurisdiction and power as follows:

1. Where an action, commenced in a justice's court in the city of Buffalo, has been discontinued upon the delivery of an undertaking, because the title to real property came in question, it possesses exclusive jurisdiction of an action for the same cause, brought pursuant to the undertaking.

2. It has exclusive power to remit a fine imposed or a recognizance estreated by it.

Court to consist of three judges; chief judge.

§ 295. The court consists of three judges; one of whom must, from time to time, as a vacancy occurs, be appointed chief-judge, as prescribed in the Constitution.

General and trial terms.

§ 296. At least four general terms and six trial terms of the court must be appointed to be held in each year.

To be tried at general term.

§ 297. An issue of law in an action in the court must be tried at the general term.

ART. 3.

Clerk may charge fees.

§ 298. The clerk of the court is entitled, in addition to his salary, for any service performed by him, to the fee allowed by law to a county clerk, for a similar service, performed in the supreme court, or the court of oyer and terminer.

Deputy clerk and special deputy clerk.

§ 299. Where the deputy-clerk of the court dies, resigns, removes from the city, is removed from office, or becomes otherwise incapable of acting, the clerk must appoint a deputy-clerk in his place. The clerk, if the judges of the court, or a majority of them, deem it necessary for the proper transaction of its business, from time to time must appoint, and may at pleasure remove, in the manner prescribed by law for the appointment and removal of a deputy-clerk, a special deputy-clerk, whose compensation must be paid by the clerk.

Stenographer.

§ 300. The judges of the court, or a majority of them, must appoint, and may at pleasure remove, a stenographer of the court, who is entitled to a salary, fixed and to be paid as prescribed by law. He must attend each term of the court, where issues of fact in civil or criminal causes are triable. If the judge requires a copy of any proceedings, written out at length from the stenographic notes, he may make an order directing the stenographer's fees therefor, at the rate of six cents for each folio so written out, to be paid as follows:

1. In a civil action or special proceeding, by the party entitled to costs upon the verdict, decision, or report; who may tax the sum paid therefor, as a disbursement.

2. In a criminal action or special proceeding, by the county treasurer of Erie county, as a county charge. But, in such a case, the judge may fix such a sum, not exceeding the rate specified in this section, as he deems proper.

Crier.

§ 301. The judges, or a majority of them, from time to time must appoint, and may at pleasure remove, a crier for the court, who is entitled to a salary, fixed and to be paid as prescribed by law. He is not entitled to any other compensation.

Sheriff, constables, etc., to attend court; special powers in contempt cases, etc.

§ 302. The sheriff of the county of Erie, or his under-sheriff, or a deputy-sheriff, designated by him, and as many policemen of the city of Buffalo, as the court directs, must attend each term of the court. A policeman, in attendance upon a term of the court, may, under the direction of the judge presiding at or holding the term, notify talesmen or additional jurors, and execute a mandate of the court, issued in a case of contempt, with like effect and in like manner as if he was the sheriff. But a policeman is not entitled to any fees, or other compensation, except his salary, for a service performed by him, as prescribed in this section.

Assessors to return jury list.

§ 303. The assessors of the city of Buffalo must, in the month of May in each year, make out, return, and file with the clerk of the court, a list of not less than six hundred residents of that city, not exempt from jury duty, qualified to serve as trial jurors in the court. For that purpose, the assessors may, in their discretion, associate the clerk of the court with them. The court, at any term thereof, may, from time to time, make an order, directing the assessors to make out and file, within a time specified in the order, a new list of jurors, or a list of any number of additional jurors; and it may punish an omission to obey such an order, as a contempt.

Drawing trial jurors.

§ 304. At least fourteen days before the time appointed for holding a term of the court, where issues of fact in civil or criminal causes are triable, the clerk of the court, in the presence of a judge thereof, must draw from the list so returned by the assessors, the names of thirty-six

persons, or such other number as the court, at any term thereof, directs, to serve as trial jurors. The drawing must be conducted as prescribed by law, for the drawing of trial jurors by a county clerk, except that notice thereof is not necessary. A list of the names of the persons drawn must be certified by the clerk and attending judge, and delivered to the sheriff of Erie county.

Notifying trial jurors; their fees.

§ 305. The sheriff must thereupon notify each of the persons so drawn, as prescribed by law for notifying a juror drawn to attend a term of the circuit court. Before the first day of the term, the sheriff must file the list with the clerk, accompanied with his return, specifying who were notified, and the manner in which each person was notified. The clerk must make the same disposition of the ballots, containing the names of the jurors who have served, of those who did not appear, and of those who were discharged, as prescribed by law, with respect to the circuit court. Each juror, attending a term of the court, must be paid by the county of Erie, the same compensation as a juror attending the circuit court.

Additional jurors may be ordered.

§ 306. At a term where issues of fact, in civil or criminal causes, are triable, the court may, in its discretion, direct additional jurors to be drawn from any list returned by the assessors, and require the sheriff, or a policeman in attendance upon the term, forthwith to notify them to attend; and if a person so drawn cannot be found, the court may cause his name to be returned to the box.

ARTICLE FOURTH.

PROVISIONS EXCLUSIVELY APPLICABLE TO THE CITY COURT OF BROOKLYN.

SECTION 307. Court consists of three judges; chief-judge.
308. Court always open; number of trial terms.
309. Appointment of deputy clerk and assistants to clerk.
310. Clerk may charge fees.
311. Sheriff, etc., to attend terms.
312. Expenses to be a county charge.
313. Stenographers.

Court consists of three judges; chief-judge.

§ 307. The city court of Brooklyn consists of three judges; one of whom must, from time to time, as a vacancy occurs, be appointed chief-judge of the court, as prescribed in the Constitution.

Court always open; number of trial term.

§ 308. The court is always open for the transaction of any business, for which notice is not required to be given to an adverse party. At least ten terms thereof, for the trial of issues of law or of fact, must be appointed to be held in each year.

Appointment of deputy clerk and assistants to clerk.

§ 309. The judges of the court, or a majority of them, may appoint as many special deputy clerks and assistants in the clerk's office as they deem necessary. Each officer so appointed is entitled to a salary, fixed and to be paid as prescribed by law.

Clerk may charge fees.

§ 310. The clerk of the court is entitled, in addition to his salary, for any service performed by him, to the fee allowed by law to a county clerk, for a similar service.

Sheriff, etc., to attend terms.

§ 311. The sheriff of the county of Kings, his under-sheriff, or a deputy-sheriff, designated by him, must attend each term or sitting of the court. If a deputy sheriff is designated to attend he shall be entitled to the same compensation as is allowed by law to messengers and attendants upon said court, and shall be paid in the same manner. The judge or judges holding the term may require more than one deputy sheriff to attend should it be deemed necessary.

Expenses to be a county charge.

§ 312. The expenses of the court are a county charge, and must be allowed and paid in like manner as other county charges.

TITLE 4.

§ 313. The judges of the court, or a majority of them, from time to ie must appoint, and may at pleasure remove, one or two stenog- hers, as they deem it necessary for the business of the court. Each nographer so appointed is entitled to a salary, fixed and to be paid as scribed by law. He must attend each term of the court, where ues of fact in civil or criminal causes are triable. If two steno- hers are appointed, the judges of the court must assign to each his re of the business. A stenographer may, with the assent of the ges of the court, or a majority of them, appoint an assistant-steno- her, to aid him in the discharge of his duties, whose compensation ayable by the stenographer, and is not a county charge. Stenographers.

TITLE IV.

The marine court of the city of New-York.

SECTION 314. Marine court a court of record.*
315. Jurisdiction.
316. The last section limited.
317. Jurisdiction in marine causes.
318. No power to naturalize aliens.
319. Removal of action to supreme court from marine court.
320. Justices; their general duties.
321. How suspended from office.
322. Chief-justice; how designated; his general duties, etc.
323. Justices may make rules.
324. Court when open; justices to designate terms; routine of business at the terms, etc.
325. Terms, where held; publication of appointments.
326. Justices may take oaths, acknowledgments, etc.
327. Orders, etc., how made.
328. Clerk, deputy-clerk and assistants.
329. General duties of deputy-clerk.
330. Special deputy-clerks.
331. Clerk to account monthly for fees, and pay over the same.
332. Stenographers.
333. Interpreter.
334. Id.; penalty for misconduct.
335. Court may appoint attendants, etc.
336. Interpreter and attendants not to receive fees.
337. Suspension of an officer of the court.
338. What mandates may be executed without the city.
339. Direction and execution of mandates.

§ 315. The jurisdiction of the marine court of the city of New York xtends to the following cases: Jurisdiction.

1. An action against a natural person, or against a foreign or domes- ic corporation, wherein the complaint demands judgment for a sum f money only, or to recover one or more chattels, with or without amages for the taking or detention thereof.

2. An action to foreclose or enforce a lien upon real property in the ity of New-York, created, as prescribed by statute, in favor of a per- on, who has performed labor upon, or furnished materials to be used n the construction, alteration, or repair of a building, vault, wharf, ence, or other structure; or who has graded, filled in, or otherwise mproved, a lot of land, or the sidewalk or street in front of or adjoin- ng a lot of land.

* Section 314 stricken out.

TITLE 4.

sequent general term, of a cause heard by them, or at a previous general term.

Terms, where held; publication of appointments.

§ 325. Each term so appointed must be held at the city-hall in the city of New-York, except that auxiliary or additional parts, for the transaction of any business specified in the appointment, may be held elsewhere within the city of New-York, as designated in the appointment. An appointment must be published in two newspapers, published in the city of New-York, at least once in each week, for three successive weeks, before a term is held in pursuance thereof.

Justices may take oaths, acknowledgments, etc.

§ 326. Each of the justices may, within the city of New-York, administer an oath, or take a deposition, or the acknowledgment or proof of the execution of a written instrument, and certify the same, in like manner and with like authority and effect, as a justice of the supreme court.

Orders, etc., how made.

§ 327. In an action brought in the court, an order cannot be made, or a warrant of attachment granted, by an officer, other than a justice of the court; and each provision of this act, which empowers an officer, other than a judge of the court in which an action is brought, to make an order therein, must be construed as being exclusive of an action brought in the marine court.

Clerk, deputy clerk and assistants.

§ 328. The court has a clerk, who is appointed, and may be removed, at pleasure, by the justices thereof, or a majority of them. He must, by a written instrument under his hand, filed in his office, appoint, and may at pleasure remove three deputy-clerks, and not more than ten assistants. The clerk is responsible for the faithful discharge of his duty, by each deputy clerk and each assistant. The clerk, each deputy-clerk, and each assistant, is entitled to a salary, fixed and to be paid as prescribed by law.

General duties of deputy clerk.

§ 329. The clerk, and also each deputy-clerk, before he enters upon the duties of his office, must subscribe, and file in the office of the clerk of the city and county of New York, the Constitutional oath of office. The deputy-clerk has all the powers, and may perform all the duties of the clerk, when the office of clerk is vacant, or at the clerk's office, when the clerk is absent therefrom, or at a term or sitting of the court which the deputy-clerk attends.

Special deputy clerks.

§ 330. The clerk may designate as many of his assistants, as the justices of the court, or a majority of them, deem necessary, as special deputy-clerks. Each special deputy-clerk possesses, in the absence of the clerk and a deputy-clerk, the same powers as the clerk, at any sitting or term of the court which he attends, with respect to the business transacted thereat.

Clerk to account monthly for fees, and pay over the same.

§ 331. The clerk must receive, for the use of the city of New York, the fees allowed by law. He shall not perform any service, for which a fee is allowed by law, until the fee therefor is paid to him. He must, on the first day of each month, or within three days thereafter, render to the comptroller of the city an account, under oath, of all fees received, directly or indirectly, during the preceding month, by him, or by a deputy-clerk, or either of his assistants, for any official service; and he must, at the same time, pay the same into the treasury of the city of New York. When the return and payment are so made, the clerk is entitled to receive his compensation, for the period included in the return. He is not entitled to compensation for a period for which he has not made his return and payment.

Stenographers.

§ 332. The clerk of the court must appoint three stenographers of the court, and may at pleasure remove either of them. The justices

of the court, or a majority of them, must, from time to time, assign each of the stenographers to duty at the trial terms. Each stenographer is entitled to a salary, fixed and to be paid as prescribed by law. He must attend each term to which he is assigned.

Interpreter.

§ 333. The clerk of the court, from time to time, must appoint and, may at pleasure remove, an official interpreter of the court, who is entitled to a salary, fixed and to be paid as prescribed by law. Before entering upon his official duties, he must subscribe, and file in the office of the clerk of the city and county of New York, the Constitutional oath of office. He must attend any trial or special term of the court, where his services are required; and the justices of the court, or a majority of them, may, by order, regulate his attendance.

Id.; penalty for misconduct.

§ 334. If the official interpreter knowingly and wilfully, falsely interprets any evidence, matter or thing, between a witness and the court, or a justice thereof, in the course of an action or special proceeding, he is guilty of perjury.

Clerk must appoint attendants.

§ 335. The clerk of the court must appoint, and may at pleasure remove, as many attendants upon the court as he deems necessary, not exceeding thirteen; the justices of the court, or a majority of them, may regulate their attendance. Each attendant is entitled to a salary, fixed and to be paid as prescribed by law.

Clerks, interpreter and attendants not to receive fees.

§ 336. The clerk, the deputy-clerk, an assistant to the clerk, the official interpreter, or an attendant, shall not receive any fee or compensation, except his salary, for any official service performed by him.

Suspension of an officer of the court.

§ 337. A justice of the court may, by an instrument under his hand, suspend a stenographer, or an officer specified in the last section, for a period not exceeding ten days from the filing thereof. Such an instrument must express the cause of the suspension; it must be filed in the office of the clerk of the city and county of New York; and it may be revoked, at any time before the expiration of the period of suspension, by an instrument filed in like manner, under the hand of the justice who executed the first instrument, or the hands of a majority of the justices of the court. Where such an instrument has been revoked, the officer shall not be again suspended for the same cause.

What mandates may be executed without the city.

§ 338. A mandate of the court can be executed only within the city of New York, except as follows:

1. An execution upon a judgment rendered therein, for a sum exceeding twenty-five dollars, may be issued out of the court, tested in the name of the chief-justice thereof, to the sheriff of any county, wherein the judgment has been duly docketed.

2. A subpœna may be served within either of the counties of Richmond, Kings, Queens, or Westchester.

3. A warrant to apprehend a witness for a failure to obey a subpœna, may be executed by the sheriff of the city and county of New York, or a marshal of that city, within either of those counties.

4. An order duly made, in an action pending in the court, requiring the performance of an act by a party thereto, or by an officer, may be served upon a person bound to obey the order, and his obedience thereto may be required in any part of the State.

5. An order to show cause, why a person should not be punished for a contempt of the court, may be served by any person in any part of the State.

6. A warrant to apprehend, and bring before the court, a person charged with such a contempt, may be executed by the sheriff of the

TITLE 5.

city and county of New York, or a marshal of that city, in any part of the State.

Direction and execution of mandates.

§ 339. In an action brought in the court, an order of arrest, a warrant of attachment, an execution, or a requisition to replevy a chattel, must be directed to and executed by the sheriff. Any other mandate, which must have been directed to and executed by the sheriff of the city and county of New York, if it issued out of the supreme court, may, where it issues out of the marine court, be directed to and executed either by that sheriff, or a marshal of that city, named therein. A marshal is entitled to the same fees as the sheriff, upon a mandate directed to him, or upon the service of a summons; and each provision of law, relating to the execution of a mandate by the sheriff, and the power and control of the court over the sheriff executing the same, applies to the marshal. The return of a marshal to such a mandate, or his certificate of the execution thereof, or of the service of any paper served by him, has the same force and effect as the like return and certificate of a sheriff.

TITLE V.

The county courts.

SECTION 340. Jurisdiction.
341. Domestic corporation, etc., when deemed resident, etc.
342. Action, etc., wherein county judge is incapable to act.
343. Supreme court may remove action, and change place of trial.
344. Effect of order of removal; appeal, etc.
345. Stay of proceedings.
346. Removal of action not to impair process, etc.
347. County court may send its process to any county.
348. When jurisdiction, etc., co-extensive with supreme court.
349. Power of county judge in special proceedings.
350. Fines and penalties; how remitted.
351. Restrictions upon power to remit.
352. Notice of application, etc.; costs to be paid on remission.
353. Fines imposed by justices of the peace; how remitted.
354. Who may make orders.
355. County court when open; terms thereof.
356. Notice of appointment to be published.
557. Jurors, how drawn and summoned.
358. Stenographers for county courts.
359. Stenographer for county courts and surrogate's court in Kings county.
360. Id.; assistant-stenographer.
361. Stenographer for county courts of Monroe and Livingston counties.

Jurisdiction.

§ 340. The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provision:

1. To an action for the partition of real property; for dower; for the foreclosure, redemption, or satisfaction of a mortgage upon real property; or to procure a judgment requiring the specific performance of a contract, relating to real property; where the real property, to which the action relates, is situated within the county; or to foreclose a lien upon a chattel, in a case specified in section seventeen hundred and thirty-seven of this act, where the lien does not exceed one thousand dollars in amount, and the chattel is found within the county.

2. To an action in favor of the executor, administrator or assignee

of a judgment creditor, or, in a proper case, in favor of the judgment creditor, to recover a judgment for money remaining due upon a judgment rendered in the same court.

3. To an action for any other cause, where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding one thousand dollars; or to recover one or more chattels, the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof.

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; and to every special proceeding, which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property, of such an incompetent person, or for the sale or other disposition of the real property, situated within the county, of a person, wherever resident, who is so incompetent for either of the causes aforesaid, or who is an infant; or for the sale or other disposition of the real property, situated within the county, of a domestic religious corporation.

Domestic corporation, etc., when deemed resident, etc.

§ 341. For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or is actually located within the county, is deemed a resident of the county, and personal service of a summons, made within the county, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation, wherever it is located.

Action, etc., wherein county judge is incapable to act.

§ 342. If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the supreme court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the supreme court within the same judicial district. The supreme court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must make an order removing it to the supreme court. Thereupon the subsequent proceedings in the supreme court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.

Supreme court may remove action, and change place of trial.

§ 343. The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action, brought in a county court, under subdivision second or subdivision third of the last section but two, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial of the action must be changed by the same order to another county; and the sub-

TITLE 5.

sequent proceedings therein must be the same, as if the action had been originally brought in the supreme court.

Effect of order of removal; appeal, etc.

§ 344. An order of removal, made as prescribed in either of the last two sections, takes effect upon the entry thereof in the office of the county clerk. Where the order directs that the action be tried in another county, the clerk with whom it is entered, must forthwith deliver to the clerk of that county, all papers filed therein, and certified copies of all minutes and entries relating thereto; which must be filed, entered, or recorded, as the case requires, in the office of the last mentioned clerk. The provisions of section two hundred and seventy-one of this act apply to an appeal taken from such an order.

Stay of proceedings.

§ 345. An order to stay proceedings, for the purpose of affording an opportunity to make the application for removal, may be made by the county judge, or by a judge authorized to make such an order in the supreme court, and with like effect and under like circumstances.

Removal of action not to impair process, etc.

§ 346. The removal of an action or special proceeding, as prescribed in this title, does not invalidate, or in any manner impair, a process, provisional remedy, or other proceeding, or a bond, undertaking, or recognizance in the action or special proceeding so removed; each of which continues to have the same validity and effect, as if the removal had not been made. Where bail was given, the surrender of the defendant in the supreme court has the same effect, as a surrender in the county court would have had, if the action or special proceeding had remained therein.

County court may send its process to any county.

§ 347. A county court has power, in an action or special proceeding of which it has jurisdiction, to send its process and other mandates into any county of the State, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court.

When jurisdiction, etc., co-extensive with supreme court.

§ 348. Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the supreme court possesses in a like case; and it may render any judgment, or grant either party any relief, which the supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.

Power of county judge in special proceedings.

§ 349. The county judge also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.

Fines and penalties; how remitted.

§ 350. Upon the application of a person, who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety, the county court of the county in which the term of the court was held, where the fine was imposed, or the recognizance taken, may, except as otherwise prescribed in the next section, upon good cause shown, and upon such terms as it deems just, make an order, remitting the fine, wholly or partly, or the forfeiture of the recognizance, or part of the penalty thereof; or it may discharge the recognizance. If a fine so remitted has been paid, the county treasurer, or other officer, in whose hands the money remains, must pay the same, or the part remitted, according to the order.

Restrictions upon

§ 351. The last section does not authorize a county court, to remit any part of a fine, exceeding two hundred and fifty dollars, imposed

by a court of oyer and terminer, or a court of sessions, upon a conviction for a criminal offence; or a fine, to any amount, imposed by a court upon an officer or other person, for an actual contempt of court, or for disobedience to its process, or other mandate; or to remit or discharge a recognizance, taken in its county, for the appearance of a person in another county. In the latter case, the power of remitting or discharging the recognizance is vested in the county court of the county, in which the person is bound to appear. power to remit.

§ 352. An application for an order, as prescribed in the last section but one, cannot be heard, until such notice thereof as the court deems reasonable, has been given to the district-attorney of the county, and until he has had an opportunity to examine the matter, and prepare to resist the application. And upon granting such an order, the court must always impose, as a condiction* thereof, the payment of the costs and expenses, if any, incurred in an action or special proceeding for the collection of the fine, or the penalty of the recognizance. Notice of application, etc.; costs to be paid on remission.

§ 353. Where a person has been fined by a court of special sessions, or by a justice of the peace, upon a conviction for an offence, and has been committed to jail for non-payment of the fine, the county court of the county may make an order, remitting the fine, wholly or partly, and discharging him from his imprisonment. The power conferred by this section must be exercised in the manner prescribed, and subject to the provisions contained, in the last three sections. Fines imposed by justices of the peace; how remitted.

§ 354. In an action or special proceeding in a county court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the county where the attorney for the applicant resides, in a case where the county judge, in whose court the action or special proceeding is brought, may make the same, out of court; and with like effect. Who may make orders.

§ 355. The county court is always open for the transaction of any business, for which notice is not required to be given to an adverse party, except where it is specially prescribed by law, that the business must be done at a stated term. The county judge must, from time to time, appoint the times and places for holding terms of his court. At least two terms, for the trial of issues of law or of fact, must be appointed to be held in each year. Each term may contine as long as the county judge deems necessary. The county judge may, by a new appointment, change the day appointed for holding a term, or appoint one or more additional terms, or dispense with the holding of a term, without affecting any other term or terms theretofore appointed to be held. Each term must be held at the place designated by statute for that purpose; except that the county judge may, from time to time, adjourn a term to any place within the county, for the hearing and decision of motions and appeals, and trials and other proceedings without a jury; and may appoint as many terms as he thinks proper to be held, either at the court house or elsewhere in the county, for the same purpose. County court when open; terms thereof.

§ 356. Each appointment, made as prescribed in the last section, must be filed in the county clerk's office, and a copy thereof published, at least once in each week, for three successive weeks before a term is held, changed, or dispensed with, by virtue thereof, in the newspaper in the city of Albany, in which legal notices are required to be pub- Notice of appointment to be published.

*So in the original.

TITLE 5.

lished, and also in at least one newspaper, published in the county, and as many additional newspapers, published therein, as the county judge prescribes. The expense of the publication is a county charge.

Jurors, how drawn and notified.

§ 357. Jurors for the terms of the county court, at which issues of fact are triable by jury, and of the court of sessions, must be drawn and notified in the same manner as for a term of the circuit court.

Stenographers for county courts.

§ 358. The board of supervisors of any county, except Kings, Livingston, and Monroe, may provide for the employment of a stenographer for the county court and court of sessions thereof, and must fix his compensation, and provide for the payment thereof, in the same manner as other county expenses are paid.

Stenographer for county court and court of sessions in Kings county.

§ 359. The county judge of the county of Kings, from time to time must appoint, and may at pleasure remove, a stenographer, to be attached to the county court, and the court of sessions, of the county of Kings, who is entitled to a salary, fixed and to be paid as prescribed by law. He must attend each trial of an issue of fact in the county court or court of sessions. The stenographer appointed as prescribed in this section, may, with the consent of the county judge, appoint an assistant stenographer to aid him in the discharge of his duties, whose compensation shall be paid by the stenographer, and is not a county charge.

Interpreter for county court, etc., in Kings county.

§ 360. The county judge and the surrogate of the county of Kings, from time to time, must appoint, and may at pleasure remove, an interpreter, to be attached to the county court, the court of sessions, and the surrogate's court of the county of Kings. Before entering upon the discharge of his duties, he must file in the county clerk's office the constitutional oath of office, and an additional oath, which may be incorporated into the constitutional oath, to the effect that he will fully and correctly interpret and translate each question propounded to a witness and each answer thereto.

Stenographer for county courts of Monroe, Livingston and Niagara counties.

§ 361. The judge holding or presiding at a term of the county court or court of sessions, in either of the counties of Livingston, Niagara or Monroe, where issues of fact are triable, may employ a stenographer to take stenographic notes upon trials thereat, who is entitled to a compensation, to be certified by the judge, not exceeding ten dollars for each day's attendance, at the request of the judge. The stenographer's compensation is a charge upon the county, and, in the counties of Livingston and Niagara must be audited, allowed and paid as other county charges; and in the county of Monroe must be paid by the county treasurer on an order of the court, granted on the affidavit of the stenographer and the certificate of the judge, that the services were rendered.

CHAPTER IV.

LIMITATION OF THE TIME OF ENFORCING A CIVIL REMEDY.

TITLE I.—ACTIONS FOR THE RECOVERY OF REAL PROPERTY.
TITLE II.—ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.
TITLE III.—GENERAL PROVISIONS.

TITLE I.

Actions for the recovery of real property.

SECTIONS 362. When the people will not sue.
363. Action by grantee from the State.
364. Action after anulling letters patent.
365, 366. Seizin within twenty years, when necessary, etc.
367. Action after entry.
368. Possession, when presumed; occupation presumed to be under legal title.
369. Adverse possession under written instrument or judgment.
370. Id.; what constitutes it.
371. Adverse possession under claim of title not written.
372. Id.; what constitutes it.
373. Relation of landlord and tenant, as affecting adverse possession.
374. Right not affected by descent cast.
375. Certain disabilities excluded from time to commence action.

§ 362. The people of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either: When the people will not sue.

1. The cause of action accrued within forty years before the action is commenced; or,

2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time.

§ 363. An action shall not be brought for or with respect to real property, by a person claiming by virtue of letters patent or a grant, from the people of the State, unless it might have been maintained by the people, as prescribed in this title, if the patent or grant had not been issued or made. Action by grantee from the State.

§ 364. Where letters patent or a grant of real property, issued or made by the people of the State, are declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion or concealment, or of a forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title; an action Action after annulling letters patent.

TITLE I.

of ejectment, to recover the premises in question, may be commenced, either by the people, or by a subsequent patentee or grantee of the same premises, his heirs, or assigns, within twenty years after the determination is made; but not after that period.

Seizin within twenty years, when necessary, etc.

§ 365. An action to recover real property, or the possession thereof, cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

The same.

§ 366. A defence or counterclaim, founded upon the title to real property, or to rents or services out of the same, is not effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the committing of the act, with respect to which it is made.

Action after entry.

§ 367. An entry upon real property is not sufficient or valid as a claim, unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time, when the right to make it descended or accrued.

Possession, when presumed; occupation presumed to be under legal title.

§ 368. In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action.

Adverse possession under written instrument or judgment.

§ 369. Where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree, or judgment, or of some part thereof, for twenty years, under the same claim; the premises so included are deemed to have been held adversely: except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot.

Id.; what constitutes it.

§ 370. For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated.

Adverse possession under claim of title not written.

§ 371. Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

372. For the purpose of constituting an adverse possession, by a Id.; what constitutes it.
n claiming title, not founded upon a written instrument, or a
ment or decree, land is deemed to have been possessed and occu-
in either of the following cases, and no others:
Where it has been protected by a substantial inclosure.
Where it has been usually cultivated or improved.

373. Where the relation of landlord and tenant has existed between Relation of landlord and tenant, as affecting adverse possession.
persons, the possession of the tenant is deemed the possession
e landlord, until the expiration of twenty years after the ter-
tion of the tenancy; or, where there has been no written lease,
the expiration of twenty years after the last payment of rent;
thstanding that the tenant has acquired another title, or has
ed to hold adversely to his landlord. But this presumption shall
e made, after the periods prescribed in this section.

374. The right of a person to the possession of real property is not Right not affected by descent cast.
ired or affected, by a descent being cast, in consequence of the
of a person in possession of the property.

375. If a person, who might maintain an action to recover real Certain disabilities excluded from time to commence action.
rty, or the possession thereof, or make an entry, or interpose a
ce or counterclaim, founded on the title to real property, or to
or services out of the same, is, when his title first descends, or
use of action or right of entry first accrues, either:
Within the age of twenty-one years; or,
Insane; or,
Imprisoned on a criminal charge, or in execution upon conviction
criminal offence, for a term less than for life;
e time of such a disability is not a part of the time, limited in
title, for commencing the action, or making the entry, or inter-
g the defence or counterclaim; except that the time so limited can-
be extended more than ten years, after the disability ceases, or
the death of the person so disabled.

TITLE II.

Actions other than for the recovery of real property.

SECTION 376. When satisfaction of judgment presumed.
377. Effect of return of execution.
378. How presumption raised.
379. Limitation of action to redeem from a mortgage.
380. Other periods of limitation.
381. Within twenty years.
382. Within six years.
383. Within three years.
384. Within two years.
385. Within one year.
386. When cause of action accrues on a current account.
387. Action for penalty, etc., by any person who will sue.
388. Actions not before provided for.
389. Actions by the people subject to the same limitations.
390. Action against a non-resident, upon a demand barred by the law of his residence.
391. When person liable, etc., dies without the State.

TITLE 2.

392. Cause of action accruing between the death of a testator or intestate, and the grant of letters.
393. No limitation of action on bank notes, etc.
394. Action against directors, etc., of banks.
395. Acknowledgment or new promise must be in writing.
396. Exceptions, as to persons under disabilities.
397. Defence or counterclaim.

When satisfaction of judgment presumed.

§ 376. A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the State, or heretofore or hereafter rendered, in a court of record within the United States, or elsewhere, is presumed to be paid and satisfied, after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive; except as against a person, who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree; or his heir or personal representative; or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby.

Effect of return of execution.

§ 377. If the proof of payment, under the last section, consists of the return of an execution partly satisfied, the adverse party may show, in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him, or by a person whom he represents.

How presumption raised.

§ 378. A person may avail himself of the presumption created by the last section but one, under an allegation that the action was not commenced, or that the proceeding was not taken, within the time therein limited.

Limitation of action to redeem from a mortgage.

§ 379. An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the non-fulfilment of a covenant therein contained.

Other periods of limitation.

§ 380. The following actions must be commenced within the following periods, after the cause of action has accrued.

Within twenty years.

§ 381. Within twenty years:

An action upon a sealed instrument.

But where the action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action is for the purposes of this section only, deemed to have accrued upon an eviction, and not before.

Within six years.

§ 382. Within six years:

1. An action upon a contract, obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, eighteen hundred and forty-six, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to

have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a court not of record, except a decree heretofore rendered in a surrogate's court of the State. The cause of action, in such a case, is deemed to have accrued, when final judgment was rendered.

Within three years.

§ 383. Within three years:

1. An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except an escape.

3. An action upon a statute, for a penalty or forfeiture, where the action is given to the person aggrieved, or to that person and the people of the State; except where the statute imposing it prescribes a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, to recover a chattel, or damages for taking, detaining, or injuring personal property, by the defendant, or the person whom he represents.

5. An action to recover damages for a personal injury, resulting from negligence.

Within two years.

§ 384. Within two years:

1. An action to recover damages for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of the State.

Within one year.

§ 385. Within one year:

1. An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution.

2. An action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate.

When cause of action accrues on a current account.

§ 386. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side.

Action for penalty, etc., by any person who will sue.

§ 387. An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the State, by the Attorney-General, or the district-attorney of the county where the offence was committed.

Actions not before provided for.

§ 388. An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.

Actions by the people subject to the same limitations.

§ 389. The limitations, prescribed in this title, apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

TITLE 2.

Action against a non-resident, upon a demand barred by the law of his residence.

§ 390. Where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time, limited, by the laws of his residence, for bringing a like action, except by a resident of the State, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the State.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State.

When person liable, etc., dies without the State.

§ 391. If a person, against whom a cause of action exists, dies without the State, the time which elapses between his death, and the expiration of eighteen months after the issuing, within the State, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

Cause of action accruing between the death of a testator or intestate, and the grant of letters.

§ 392. For the purpose of computing the time, within which an action must be commenced in a court of the State, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining or injuring personal property within the same period; the letters are deemed to have been issued within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof: in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

No limitation of action on bank notes, etc.

§ 393. This chapter does not affect an action to enforce the payment of a bill, note, or other evidence of debt, issued by a moneyed corporation, or issued or put in circulation as money.

Action against directors, etc., of banks.

§ 394. This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such an action must be brought within three years after the cause of action has accrued.

Acknowledgment or new promise must be in writing.

§ 395. An acknowledgment or promise, contained in a writing signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest.

Exceptions as to persons under disabilities.

§ 396. If a person, entitled to maintain an action specified in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action accrues, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time, limited in this title for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after the disability ceases.

Defence or counter-claim.

§ 397. A cause of action, upon which an action cannot be maintained, as prescribed in this title, cannot be effectually interposed as a defence or counterclaim.

TITLE III.

General provisions.

SECTION 398. When action deemed to be commenced.
399. Attempt to commence action in a court of record.
400. Id.; in a court not of record.
401. Exception, when defendant is without the State.
402. Id.; when a person, entitled, etc., dies before limitation expires.
403. Id.; when a person liable, etc., dies within the State.
404. In suits by aliens, time of disability in case of war to be deducted.
405. Provision where judgment has been reversed.
406. Stay by injunction, etc., to be deducted.
407. Certain actions by a principal, for misconduct of an agent, etc.
408. Disability must exist when right accrues.
409. If several disabilities, no limitation until all removed.
410. Provision when the action cannot be maintained without a demand.
411. Provision in case of submission to arbitration.
412. Provision when action is discontinued, etc., after answer.
413. How objection taken, under this chapter.
414. Cases to which this chapter applies.
415. Mode of computing periods of limitation.

When action deemed to be commenced.

§ 398. An action is commenced against a defendant, within the meaning of any provision of this act, which limits the time for commencing an action, when the summons is served on him; or, on a co-defendant who is a joint contractor, or otherwise united in interest with him.

Attempt to commence action in a court of record.

§ 399. An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons,

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as against that defendant, pursuant to an order for service upon him in that manner.

Id.; in a court not of record.

§ 400. The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action in a court not of record, where the summons is delivered to an officer authorized to serve the same, within the city or town wherein the person resides or the corporation is located, as specified in that section; provided that actual service thereof is made with due diligence.

Exception, when defendant is without the State.

§ 401. If, when the cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor, after his return into the State. If, after a cause of action has accrued against a person, he departs from and resides without the State, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time, limited for the commencement of the action. But this section does not apply while a designation made as prescribed in section four hundred and thirty, or in subdivision second of section four hundred and thirty-two of this act remains in force.

Id.; when a person entitled, etc., dies before limitation expires.

§ 402. If a person, entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death.

Id.; when a person liable, etc., dies within the State.

§ 403. The term of eighteen months after the death, within the State, of a person, against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued, within the State, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such letters are issued, is not a part of the time limited for the commencement of such an action.

In suits by aliens time of disability in case of war to be deducted.

§ 404. Where a person is disabled to sue in the courts of the State, by reason of either party being an alien subject or citizen of a country at war with the United States, the time of the continuance of the disability is not a part of the time limited for the commencement of the action.

Provision where judgment has been reversed.

§ 405. If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.

Stay by injunction, etc., to be deducted.

§ 406. Where the commencement of an action has been stayed by injunction, or by other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time, limited for the commencement of the action.

Certain actions by a principal, for misconduct of an agent, etc.

§ 407. Where an injury results from the act or omission of a deputy or agent, the time, within which an action to recover damages by reason thereof, must be commenced by the principal, against the deputy or agent, must be computed from the time, when a judgment against the principal, for the act or omission, is first recovered by the aggrieved person; and a subsequent reversal or setting aside of the judgment does not extend the time.

Disability must exist when right accrues.

§ 408. A person cannot avail himself of a disability unless it existed when his right of action or of entry accrued.

If several disabilities, no limitation until all removed.

§ 409. Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach, until all are removed.

Provision when the action can not be maintained without demand.

§ 410. Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make the demand is complete; except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

Provision in case of submission to arbitration.

§ 411. Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge: the time which has elapsed, between the entering into the written submission or agreement, and the revocation thereof, or the expiration of the stay, is not a part of the time, limited for the commencement of the action.

Provision when action is discontinued, etc., after answer.

§ 412. Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely, at the trial, upon a defence or counterclaim then existing in his favor, the remedy upon which, at the time of the commencement of the action, was not barred by the provisions of this chapter; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death; the time which intervened, between the commencement and the termination of the action, is not a part of the time, limited for the commencement of an action by the defendant, to recover for the cause of action so interposed as a defence, or to interpose the same defence in another action brought by the same plaintiff, or a person deriving title from or under him.

How objection taken, under this chapter.

§ 413. The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defence or counterclaim can be taken only by reply; except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer.

Cases to which this chapter applies.

§ 414. The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

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2. A cause of action or a defence which accrued before the first da of July, eighteen hundred and forty-eight. The statutes then in forc govern, with respect to such a cause of action or defence.

3. A case, not included in the last subdivision, in which a person entitled, when this act takes effect, to commence an action, or to inst tute a special proceeding, or to take any proceeding therein, or to pu sue a remedy upon a judgment, where he commences, institutes, otherwise resorts to the same, before the expiration of two years aft this act takes effect; in either of which cases, the provisions of law a plicable thereto, immediately before this act takes effect, continue to so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, wh this act takes effect.

The word, "action," contained in this chapter, is to be construe when it is necessary so to do, as including a special proceeding, or a proceeding therein, or in an action.

Mode of computing periods of limitation.

§ 415. The periods of limitation, prescribed by this chapter, exce as otherwise specially prescribed therein, must be computed from t time of the accruing of the right to relief by action, special proceedin defence, or otherwise, as the case requires, to the time when the cla to that relief is actually interposed by the party, as a plaintiff or a d fendant, in the particular action or special proceeding.

CHAPTER V.

COMMENCEMENT OF AND PARTIES TO AN ACTION.

TITLE I.—COMMENCEMENT OF AN ACTION.
TITLE II.—PARTIES TO AN ACTION.

TITLE I.

Commencement of an action.

ICLE 1. The summons and accompanying papers; personal service thereof; appearance of the defendant.
2. Substitutes for personal service in special cases.

ARTICLE FIRST.

I SUMMONS AND ACCOMPANYING PAPERS: PERSONAL SERVICE THEREOF; APPEARANCE OF THE DEFENDANT.

TION 416. Action to be commenced by summons; time when court acquires jurisdiction.
417. Requisites of summons.
418. Form of summons.
419. Service of copy complaint or notice with summons; consequence of failure.
420. Cases where such service must be made.
421. Appearance of defendant.
422. When defendant must answer at time of appearing.
423. Notice of no personal claim; effect of service thereof.
424. Effect of voluntary appearance.
425. Summons; when and by whom served. Sheriff's duty.
426. How personal service of summons made upon a natural person.
427, 428. Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.
429. Id.; when delivery of copy to lunatic dispensed with.
430. Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.
431. How personal service of summons made upon a domestic corporation.
432. Id.; upon a foreign corporation.
433. Service of process, etc., to commence a special proceeding.
434. Proof of service of summons, etc.; how made.

Action to be commenced by summons; time when court acquires jurisdiction.

§ 416. A civil action is commenced by the service of a summons. ut from the time of the granting of a provisional remedy, the court quires jurisdiction, and has control of all the subsequent proceedings. levertheless, jurisdiction thus acquired is conditional, and liable to be ivested, in a case where the jurisdiction of the court is made depend- nt, by a special provision of law, upon some act, to be done after the anting of the provisional remedy.

Requisites of summons.

§ 417. The summons must contain the title of the action, specifying he court in which the action is brought, the names of the parties to he action, and, if it is brought in the supreme court, the name of the ounty in which the plaintiff desires the trial; and it must be subcribed by the plaintiff's attorney, who must add to his signature his ffice address, specifying a place within the State where there is a

post-office. If in a city he must add the street, and street number, if any, or other suitable designation of the particular locality.

§ 418. The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

"To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated ." The summons is deemed the mandate of the court.

§ 419. A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default, without application to the court, unless either the defendant appears, or by * a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section.

Cases where such service must be made.

§ 420. Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit.

Appearance of defendant.

§ 421. The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section four hundred and seventeen of this act, concerning the office address of the plaintiff's attorney.

When defendant must answer at time of appearing.

§ 422. A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in section four hundred and seventy-nine of this act.

Notice of no personal claim; effect of service thereof.

§ 423. Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served, unreasonably defends the action, costs may be awarded against him.

Effect of voluntary appearance.

§ 424. A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

* So in the original.

ART. 1.

Summons; when and by whom served. Sheriff's duty.

§ 425. The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made; in that case, the service cannot be made afterwards. Where a summons is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it, and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence.

How personal service of summons made upon a natural person

§ 426. Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the State, as follows:

1. If the defendant is an infant, under the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the State, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

2. If the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee has been appointed, to the committee, and also to the defendant in person.

3. If the action is against a sheriff, for a cause specified in section one hundred and fifty-eight of this act, by delivering it to the defendant in person, or to his under-sheriff in person, or at the office of the sheriff, during the hours when it is required by law to be kept open, to a deputy-sheriff or a clerk in the employment of the sheriff, or other person in charge of the office.

4. In any other case, to the defendant in person.

Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.

§ 427. If the defendant is an infant of the age of fourteen years, or upwards, or if the court has, in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered.

The same.

§ 428. In a case specified in subdivision first or second of section four hundred and twenty-six of this act, where the court has, in its opinion, reasonable ground to believe, that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason, he is not a fit person to protect the rights of the defendant, it may likewise make an order, as prescribed in the last section. In a case specified in subdivision second, the court may, as a part of the same order, or by a separate order, made, in like manner and upon like ground, at any stage of the action, appoint a special guardian ad litem to conduct the defence for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

Id.; when delivery of copy to lunatic dispensed with.

§ 429. Where the defendant has been judicially declared to be incompetent to manage his affairs, in consequence of lunacy, and it appears satisfactorily to the court, by affidavit, that the delivery of a copy of the summons to him, in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make

TITLE I.

an order, dispensing with such delivery. In that case, a delivery of a copy of the summons, to a committee duly appointed for him, is sufficient personal service upon the defendant.

Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.

§ 430. A resident of the State, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another resident of the State, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, during the absence from the United States of the person making the designation; and may file the same, with the written consent of the person so designated, executed and acknowledged in the same manner, in the office of the clerk of the county, where the person making the designation resides. The designation must specify the occupation or other proper addition, and the residence of the person making it, and also of the person designated: and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent, or revocation; and must note, upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, as prescribed in this section, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it was served personally upon the person making the designation, notwithstanding the return of the latter to the United States.

How personal service of summons made upon a domestic corporation.

§ 431. Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, alderman,* and commonalty of the city of New-York, to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk; or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

Id.; upon a foreign corporation.

§ 432. Personal service of the summons, upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the Secretary of State. The designation must specify a place, within the State, as the office or residence of the person designated; and, if it is within a city, the

* So in the original.

street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the State, by a writing, executed by him, and filed in like manner. The Secretary of State may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

Service of process, etc., to commence a special proceeding.

§ 433. The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

Proof of service of summons, etc.; how made.

§ 434. Proof of service, as prescribed in this article, must be made by affidavit, except as follows:

1. If the service was made by the sheriff, it may be proved by his certificate thereof.

2. If the defendant served is an adult, who has not been judicially declared to be incompetent to manage his affairs, the service may be proved by a written admission, signed by him, and either acknowledged by him, and certified in like manner as a deed to be recorded in the county, or accompanied with the affidavit of a person, other than the plaintiff, showing that the signature is genuine.

A certificate, admission, or affidavit of service of a summons, must state the time and place of service. A written admission of the service of a summons, or of a paper accompanying the same, imports, unless otherwise expressly stated therein, or otherwise plainly to be inferred from its contents, that a copy of the paper was delivered to the person signing the admission.

ARTICLE SECOND.

SUBSTITUTES FOR PERSONAL SERVICE IN SPECIAL CASES.

SECTION 435. Order for service of summons from supreme court, when defendant not found, etc.
436. How service must be made.
437. Papers to be filed; proof of service.
438. Cases in which service of summons by publication, etc., may be ordered.
439. Papers upon which order for publication may be made.
440. By whom order may be made; contents of order.
441. When publication must be commenced; when service deemed complete.
442. Papers to be filed; notice to defendant.

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SECTION 443. Id.; when service is made without the State.
444. Proof of service.
445. Defendant when allowed to defend.

Order for service of summons from supreme court, when defendant not found, etc.

§ 435. Where a summons is issued in the supreme court, an order for the service thereof, upon a defendant residing within the State may be made by the court, or a judge thereof, or the county judge of the county where the action is triable, upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the State, that he avoids service, so that personal service cannot be made.

How service must be made.

§ 436. The order must direct, that the service of the summons be made, by leaving a copy thereof, and of the order, at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's residence, and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him, at his place of residence, in the post-office at the place where he resides.

Papers to be filed; proof of service.

§ 437. The order, and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the summons is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication, pursuant to an order for that purpose, made as prescribed in the next section.

Cases in which service of summons by publication, etc., may be ordered.

§. 438. An order, directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or being a natural person, is not a resident of the State; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the State.

2. Where the defendant, being a resident of the State, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.

3. Where the defendant, being an adult, and a resident of the State, has been continuously without the United States more than six months next before the granting of the order, and has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the State, after diligent effort.

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the State, or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto, as fixed in that chapter; and the limitation would have expired within sixty days next preceding the application, if the time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the State, and the defendant is a stockholder thereof.

Papers upon which order for publication may be made.

§ 439. The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

By whom order may be made; contents of order.

§ 440. The order may be made by a judge of the court, or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the State, upon the defendant personally, if he is of full age, or an infant of the age of fourteen years or upwards; or, if the defendant is a corporation, upon an officer thereof, specified in section four hundred and thirty-one or four hundred and thirty-two of this act. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a specified post-office, one or more sets of copies of the summons, complaint, and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order; or a statement that the judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

When publication must be commenced; when service deemed complete.

§ 441. The first publication, in each newspaper designated in the order, or the service upon the defendant, without the State, must be made within three months after the order is granted. For the purpose of reckoning the time, within which the defendant must appear or answer, service by publication is complete, upon the day of the last publication pursuant to the order; and service made without the State is complete, upon the expiration thereafter of a time equal to that prescribed for publication.

Papers to be filed; notice to defendant.

§ 442. Where service is made by publication, the summons, complaint, and order, and the papers upon which the order was made, must be filed with the clerk, on or before the day of the first publication; and a notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be thus served, substantially in the following form, the blanks being properly filled up, must be subjoined to, and published with the summons:

TITLE II.

"To : The foregoing summons is served upon you, by publication, pursuant to an order of " (naming the judge and his official title), "dated the day of , 18 , and filed with the complaint in the office of the clerk of at ."

Id.; when service is made without the State.

§ 443. Where service is made without the State, the papers specified in the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, "without the State of New York," must be substituted for the words, "by publication."

Proof of service.

§ 444. Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office, or of delivery, of a paper required to be deposited or delivered by the provisions of this article, must be made by the affidavit of the person, who deposited or delivered it.

Defendant when allowed to defend.

§ 445. Where the summons is served, pursuant to an order made as prescribed in this article, and the defendant so served does not appear, he, or his representative, on application and sufficient cause shown, at any time before final judgment, must be allowed to defend the action; and, except in an action for divorce, or wherein the contrary is expressly prescribed by law, the defendant, or his representative, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal service of written notice thereof; or, if such a notice has not been served, within seven years after the filing of the judgment-roll. If the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold, to a purchaser in good faith, pursuant to a direction contained in the judgment, or by virtue of an execution issued upon the same, shall not be affected thereby.

TITLE II.

Parties to an action.

ARTICLE 1. Parties generally.
2. Parties severally liable.
3. Parties prosecuting and defending as poor persons.
4. Infant plaintiffs and defendants.

ARTICLE FIRST.

PARTIES GENERALLY.

SECTION 446. Who may be joined as plaintiffs.
447. Id.; as defendants.
448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.

449. Trustee of express trust, etc., may sue without person beneficially interested.
450. When married woman is a party.
451. When defendant or his name is unknown.
452. When court to decide controversy, or to order other parties to be brought in.
453. Supplemental summons.

Who may be joined as plaintiffs.

§ 446. All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.

Id.; as defendants.

§ 447. Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party defendant, for the complete determination or settlement of a question involved therein; except as otherwise expressly prescribed in this act.

Parties united in interest, when to be joined; when one or more may sue or defend for the whole.

§ 448. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one, who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Party in interest to sue trustee, etc., may sue alone.

§ 449. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

When married woman is a party.

§ 450. In an action or special proceeding a married woman appears, prosecutes, or defends, alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property.

When defendant or his name is unknown.

§ 451. Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant, in the summons, and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description, tending to identify him. In either case, the person intended is thereupon regarded as a defendant in the action, and as sufficiently described therein, for all purposes, including service of the summons, as prescribed in article second of the last title. When the name, or the remainder of the name, or the person, becomes known, an order must be made by the court, upon such notice and such terms as it prescribes, that the proceedings already taken be deemed amended, by the insertion of the true name, in place of the fictitious name or part of a name, or the designation as an unknown person; and that all subsequent proceedings be taken under the true name.

When court to decide controversy, or to order other parties to be brought in.

§ 452. The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties,

TITLE 2.

ties to be brought in

the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.

Supplemental summons.

§ 453. Where the court directs a new defendant to be brought in, and the order is not made upon his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons; except that, in the body thereof, it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them, as the case requires. And each provision of this chapter, relating to personal service, or a substitute for personal service of an original summons, applies to such a supplemental summons.

ARTICLE SECOND.

PARTIES SEVERALLY LIABLE.

SECTION 454. Persons liable for the same demand may be sued together.
455. Defendant so sued may apply for any relief.
456. Proceedings in actions against defendants severally liable.
457. Application of this article to defendants jointly liable.

When persons liable for the same demand may be sued together.

§ 454. Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff.

Defendant so sued may apply for any relief.

§ 455. The joinder of a person, as defendant in an action, with another person, as prescribed in the last section, does not affect his right to any order or other relief, to which he would have been entitled, if he had been separately sued in the action.

Proceedings in action against defendants severally liable.

§ 456. Where a summons, issued against two or more defendants, alleged to be severally liable, is served upon some, but not upon all of them, the plaintiff may proceed against those upon whom it is served, as if they were the only defendants named therein. Where it is served upon all of them, the plaintiff may take judgment against one or more of them, where he would be entitled to judgment, if the action was against him or them alone. Where judgment is so taken, the clerk must, upon the plaintiff's application, enter an order, directing that the action be severed, and that the plaintiff may proceed against the other defendants. In any subsequent proceeding, the plaintiff may use, together with a certified copy of such an order, a copy of a paper constituting a part of the judgment-roll, with like effect as if it was the original.

Application of this article to defendants jointly liable.

§ 457. The last three sections do not affect a defence or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and, as regards the other parties to the action, persons jointly liable are regarded as one party, for every purpose contemplated by those sections.

ARTICLE THIRD.

Parties Prosecuting and Defending as Poor Persons.

Section 458. Who may petition for leave to prosecute as a poor person.
459. Contents of petition.
460. When and how leave granted.
461. Not liable for costs and fees.
462. When leave may be annulled.
463. When defendant may petition to defend as a poor person
464. Contents of petition.
465. Proceedings thereon.
466. Appeal, when party prosecutes or defends as a poor person.
467. Costs in favor of petitioner.

Who may petition for leave to prosecute as a poor person.

§ 458. A poor person, not being of ability to sue, who alleges that he has a cause of action against another person, may apply, by petition, to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action.

Contents of petition.

§ 459. The petition must state:

1. The nature of the action brought, or intended to be brought.

2. That the applicant is not worth one hundred dollars, besides the wearing apparel and furniture, necessary for himself and his family, and the subject-matter of the action.

It must be verified by the applicant's affidavit, and supported by a certificate of a counsellor at law, to the effect that he has examined the case, and is of opinion that the applicant has a good cause of action.

When and how leave granted.

§ 460. The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, admit him to prosecute as a poor person, and assign to him an attorney and counsel to prosecute his action, who must act therein without compensation.

Not liable for costs and fees.

§ 461. A person so admitted, may prosecute his action, without paying fees to any officer; and he shall not be prevented from prosecuting the same, by reason of his being liable for the costs of a former action, brought by him against the same defendant,* if judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him.

When leave may be annulled.

§ 462. If the person so admitted is guilty of improper conduct in the prosecution of his action, or of wilful or unnecessary delay, the court may, in its discretion, annul the order admitting him to prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby.

When defendant may petition to defend as a poor person.

§ 463. A defendant in an action involving his right, title, or interest, in or to real or personal property, may petition the court, in which the action is pending, for leave to defend the action as a poor person, and to have an attorney and counsel assigned to conduct his defence.

Contents of petition.

§ 464. The petition must contain the same matters, respecting the ability of the petitioner, required to be contained in a petition for leave to prosecute as a poor person; and it must be supported by a similar certificate, relating to the defence.

* So in the original.

TITLE 2.

Proceedings thereon.

§ 465. The provisions of this article, relating to the order, to be made upon an application for leave to prosecute as a poor person, and the proceedings subsequent thereto, apply to the order and subsequent proceedings, upon an application for leave to defend as a poor person.

Appeal, when party prosecutes or defends as a poor person.

§ 466. An order, made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal, as a poor person; but where an appeal is taken by the adverse party, the order is applicable, in favor of the petitioner, as respondent in the appeal.

Costs in favor of petitioner.

§ 467. Where costs are awarded in favor of a person, who has been admitted to prosecute or defend as a poor person, as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party, and distributed among the attorney and counsel assigned to the poor person, as the court directs.

ARTICLE FOURTH.

Infant Plaintiffs and Defendants.

Section 468. Right of infant to bring action.
469. Guardian for infant plaintiff must be appointed.
470. Application therefor.
471. Application for appointment of guardian for infant defendant.
472. Guardian, how appointed. Clerk, when to act.
473. Guardian for infant defendant in certain real actions.
474. Guardian not to receive property until security given.
475. Security.
476. Last two sections not to apply to general guardian.
477. Liability of defendant's guardian for costs.

Right of infant to bring action.

§ 468. Where an infant has a right of action, he is entitled to maintain an action thereon; and the same shall not be deferred or delayed, on account of his infancy.

Guardian for infant plaintiff must be appointed.

§ 469. Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian for the purpose of the action, who shall be responsible for the costs thereof.

Application therefor.

§ 470. The guardian must be appointed upon the application of the infant, if he is of the age of fourteen years, or upwards; or, if he is under that age, upon the application of his general or testamentary guardian, if he has one, or of a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides.

Application for appointment of guardian for infant defendant.

§ 471. An infant defendant must also appear by guardian, who must be a competent and responsible person, appointed upon the application of the infant, if he is of the age of fourteen years, or upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, as prescribed in section four hundred and forty-one of this act; or, if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. Where the application is made by a person, other than the infant, notice thereof must be given to his general or testamentary guardian, if he has one within the State, or, if he has none, to the infant himself, if he is of the age of fourteen years, or upwards, and within the State; or, if he is under that age, and within the State, to the person with whom he resides.

Guardian, how appointed. Clerk, when to act.

§ 472. The court in which the action is brought, or a judge thereof, or, if the action is brought in the supreme court, the county judge of the county where the action is triable, may appoint a guardian ad litem for an infant, either plaintiff or defendant, as prescribed in this article. The clerk must act in that capacity for an infant defendant where the court or the judge appoints him. No person, other than the clerk, shall be appointed a guardian ad litem, unless his written consent, duly acknowledged, is produced to the court or judge making the appointment.

Guardian for absent infant defendant.

§ 473. Where an infant defendant resides within the state, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian ad litem, unless he, or some one in his behalf, procures such a guardian to be appointed, as prescribed in the last two sections, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where a summons is served without the state upon an adult defendant, pursuant to an order for that purpose, granted as prescribed in section four hundred and thirty-eight of this act; except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service.

Guardian not to receive property until security given.

§ 474. Except in a case where it is otherwise specially prescribed by law, a guardian, appointed for an infant, as prescribed in this article, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court, or a county judge, to account for and apply the same, under the direction of the court.

Security.

§ 475. The security must be a bond to the infant, in such penalty as the judge directs, not less than twice the sum, or the value of the property, to be received, executed by the guardian and at least two sureties approved by the judge, and filed in the office of the clerk. The infant, or any other party to the action, may afterwards apply for an order, directing a new bond to be given, with an increased penalty; or the court may so direct, of its own motion.

Last two sections not to apply to general guardian.

§ 476. The last two sections do not apply to the general guardian of the infant, who has been appointed his guardian ad litem, as prescribed in this article; but the court may, at any time, require the general guardian to give additional security for the faithful discharge of his trust, before receiving money or property of the infant, under a judgment or order in the action.

Liability of defendant's guardian for costs.

§ 477. A person appointed guardian, as prescribed in this article, for an infant defendant in an action, is not liable for the costs of the action, unless specially charged therewith by the order of the court, for personal misconduct.

CHAPTER VI.

PLEADINGS IN COURTS OF RECORD, INCLUDING COUNTER-CLAIMS.

TITLE I.—THE CONSECUTIVE PLEADINGS IN AN ACTION.
II.—PROVISIONS GENERALLY APPLICABLE TO PLEADINGS.

TITLE I.

The consecutive pleadings in an action.

ARTICLE 1. Complaint.
2. Demurrer.
3. Answer.
4. Reply.

ARTICLE FIRST.

COMPLAINT.

SECTION 478. First pleading to be complaint.
479. Copy complaint, when to be served.
480. Consequence of failure.
481. Complaint what to contain.
482. When interlocutory and final judgment may be demanded.
483. Causes of action to be separately stated.
484. What causes of action may be joined in the same complaint.
*485. When cause of action deemed single.
*486. When alternative legal or equitable judgment may be demanded.

First pleading to be complaint.

§ 478. The first pleading, on the part of the plaintiff, is the complaint.

Copy complaint, when to be served.

§ 479. If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the State, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if after service of a copy of the complaint upon him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint, within twenty days after he appears in the action.

Consequence of failure.

§ 480. If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the court for a dismissal of the complaint.

* Stricken out.

ART. 1. Complaint; what to contain.

§ 481. The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

When interlocutory and final judgment may be demanded.

§ 482. In an action triable by the court, without a jury, the plaintiff may, in a proper case, demand an interlocutory judgment, and also a final judgment, distinguishing them clearly.

Causes of action to be separately stated.

§ 483. Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered.

What causes of action may be joined in the same complaint.

§ 484. The plaintiff may unite, in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.

2. For personal injuries, except libel, slander, criminal conversation, or seduction.

3. For libel or slander.

4. For injuries to real property.

5. Real property, in ejectment, with or without damages for the withholding thereof.

6. For injuries to personal property.

7. Chattels, with or without damages for the taking or detention thereof.

8. Upon claims against a trustee, by virtue of a contract, or by operation of law.

9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

But it must appear, upon the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear, upon the face of the complaint, that they do not require different places of trial.

ARTICLE SECOND.

DEMURRER.

SECTION 487. Defendant must demur or answer.
488. When he may demur
*489. The last section qualified.
490. Demurrer to complaint must specify grounds of objection.
*491. Rule, if too many grounds of objection are specified.
492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.
493. Defendant may demur to reply.
494. When plaintiff may demur to answer.
495. Demurrer to counterclaim, when defendant demands an affirmative judgment.
496. Demurrer to counterclaim must specify grounds of objection.
497. Amendments in certain cases after decision of demurrer.
498. When objection may be taken by answer.
499. Objection; when deemed waived.

Defendant must demur or answer. When he may demur.

§ 487. The only pleading on the part of the defendant is either a demurrer or an answer.

§ 488. The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof.

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

Demurrer to complaint must specify grounds of objection.

§ 490. The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth or eighth of section four hundred and eighty-eight of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions must point out specifically the particular defect relied upon.

Demurrer to all or part of the complaint; demurrer to part, and answer to part.

§ 492. The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to.

Defendant may demur to reply.

§ 493. The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

When plaintiff may demur to answer.

§ 494. The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.

Demurrer to counterclaim, when de-

§ 495. The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counterclaim:

* Stricken out.

ART. 2. Defendant demands an affirmative judgment.

1. That the court has not jurisdiction of the subject thereof.

2. That the defendant has not legal capacity to recover upon the same.

3. That there is another action pending between the same parties, for the same cause.

4. That the counterclaim is not of the character specified in section five hundred and one of this act.

5. That the counterclaim does not state facts sufficient to constitute a cause of action.

Demurrer to counterclaim must specify grounds of objection.

§ 496. A demurrer, taken under the last section, must distinctly specify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same, as where a demurrer is taken to a complaint.

Amendments in certain cases after decision of demurrer.

§ 497. Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions, as are necessary for the proper determination of the causes of action therein stated.

When objection may be taken by answer.

§ 498. Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

Objection; when deemed waived.

§ 499. If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action.

ARTICLE THIRD.

ANSWER.

SECTION 500. Answer; what to contain.
501. Counterclaim defined.
502. Rules respecting the allowance of counterclaims.
503. Judgment, when demand and counterclaim are equal or unequal.
504. Id.; for affirmative relief.
505. Counterclaim, when defendant is sued in a representative capacity.
506. Id.; when plaintiff is an executor or administrator.
507. Defendant may interpose several defences or counterclaims; rules relating thereto.
508. Partial defences.
509. When defendant to demand affirmative judgment.
510. Effect of improper demand of affirmative judgment.
511. When pleadings admit part of plaintiff's claim to be just, action may be served, etc.
512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.
513. Dilatory defences to be verified.

§ 500. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition.

* Stricken out.

TITLE 1.

Counterclaim defined.

§ 501. The counterclaim, specified in the last section, must tend in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:

1. A cause of action, arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

Rules respecting the allowance of counterclaims.

§ 502. But the counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

Judgment, when demand and counterclaim are equal or unequal.

§ 503. Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

Id.; for affirmative relief.

§ 504. In a case not specified in the last section, where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

Counterclaim, when defendant is sued in a representative capacity.

§ 505. In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

Id.; when plaintiff is an execu-

§ 506. In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the

time of his death, to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment, in an action against the executor or administrator. tor or administrator.

§ 507. A defendant may set forth, in his answer, as many defences or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer. Defendant may interpose several defenses or counterclaims.

§ 508. A partial defence may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defence to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defence within the meaning of this section. Partial defences.

§ 509. Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer. When defendant to demand affirmative judgment.

§ 511. Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and, if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same, as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case. When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.

§ 512. In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment-roll. Judgment, where counterclaim only is interposed for less than plaintiff's claim.

§ 513. A defence, which does not involve the merits of the action, shall not be pleaded, unless it is verified as prescribed in title second of this chapter. Dilatory defences to be verified.

* 510 stricken out.

ARTICLE FOURTH.

REPLY.

SECTION 514. Reply; what to contain.
544. Judgment upon failure to reply.
516. Cases where the court may require a reply.
517. Plaintiff may set forth several avoidances in reply.

§ 514. Where the answer contains a counter-claim, the plaintiff if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim.

Judgment upon failure to reply.

§ 515. If the plaintiff fails to reply or demur to the counterclaim the defendant may apply, upon notice, for judgment thereupon; and if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment.

Cases where the court may require a reply.

§ 516. Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counterclaim.

Plaintiff may set forth several avoidances in reply.

§ 517. A reply may contain two or more distinct avoidances of the same defence or counterclaim; but they must be separately stated and numbered.

TITLE II.

Provisions generally applicable to pleadings.

SECTION 518. Application and effect of this chapter.
519. Pleadings to be liberally construed.
520. Pleadings to be subscribed; within what time to be served.
521. When defendant to serve copy answer on co-defendant.
522. Allegation not denied; when to be deemed true.
523. When pleading must be verified; and when verification may be omitted.
524. Form and construction of certain allegations and denials in verified pleadings.
525. Verification: how and by whom made.
526. Form of affidavit of verification.
527. When verification may be confined to a counterclaim
528. Remedy for defective verification, or want of verification.
529. When defendant not excused from verifying answer to charge of fraud.
530. Private statute; how pleaded.
531. Account; how pleaded. Bill of particulars.
532. Judgments; how pleaded.
533. Conditions precedent; how pleaded.
534. Instrument for payment of money, how pleaded.
535. Pleadings in libel and slander.
536. Pleading mitigating circumstances, in action for a wrong.
537. Frivolous pleadings; how disposed of.
538. Sham defences to be stricken out.
539. Material variances; how provided for.
540. Immaterial variances; how provided for.
541. What to be deemed a failure of proof.
542. Amendments of course.
543. Amended pleading to be served; answer thereto.
544. Supplemental pleadings.
545. When a pleading may be excepted to; mode and effect or excepting.
546. Proceedings after exception.
*547. Determination upon the exception; costs; when the attorney may be ordered to pay costs.

§ 518. This chapter prescribes the form of pleadings in an action, and the rules by which the sufficiency thereof is determined, except where special provision is otherwise made by law. Application and effect of this chapter.

§ 519. The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties. Pleadings to be liberally construed.

§ 520. A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading. Pleadings to be subscribed; within what time to be served.

§ 521. Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant, who requires such a determination, must demand it in his answer, and must, at least ~~ten~~ five days before the trial, serve a copy of his answer upon the attorney for each of the defendants, to be affected by the determination. The controversy between the defendants shall not delay a When defendant to serve copy answer on co-defendant.

judgment, to which the plaintiff is entitled; unless the court otherwise directs.

Allegation not denied; when to be deemed true.

§ 522. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

When pleading must be verified; and when verification may be omitted.

§ 523. Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as proof of a fact admitted or alleged therein.

Form and construction of certain allegations and denials in verified pleading.

§ 524. The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information, to form a belief, with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Verification; how and by whom made.

§ 525. The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the State are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or, if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest, and pleading together, where neither of them, acquainted with the facts, is within that county, and capable of making the affidavit; or where the action or defence is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent of or the attorney for the party.

Form of affidavit of verification.

§ 526. The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party.

When verification may be confined to a counterclaim.

§ 527. Where the complaint is not verified, and the answer sets up a counterclaim, and also a defence by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counterclaim. In that case, the last three sections are applicable to the affidavit and the counterclaim, as if the latter was a separate pleading.

Remedy for defective verification, or want of verification.

§ 528. The remedy for a defective verification of a pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence, to the attorney of the adverse party, that he elects so to do.

When defendant not excused from verifying answer to charge of fraud.

§ 529. A defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another.

Private statute; how pleaded.

§ 530. In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof.

Account how pleaded. Bill of particulars.

§ 531. It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect, that he believes it to be true: or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account, where the one delivered is defective. The court may, in any case, direct a bill of the particulars of the claim of either party to be delivered to the adverse party.

Judgments; how pleaded.

§ 532. In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction.

Conditions precedent; how pleaded.

§ 533. In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.

Instrument for payment of money; how pleaded.

§ 534. Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect.

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TITLE 2. Pleadings in libel and slander.

§ 535. It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification.

Pleading mitigating circumstances in action for a wrong.

§ 536. In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the defendant may prove, at the trial, facts, not amounting to a total defence, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defences to the entire cause of action. A defendant, in default for want of an answer, may, upon a reference or inquiry to ascertain the amount of the plaintiff's damages, prove facts of that description.

Frivolous pleadings; how disposed of.

§ 537. If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs, as upon a motion, may be awarded upon an application pursuant to this section.

Sham defences to be stricken out.

§ 538. A sham answer or a sham defence may be stricken out by the court, upon motion, and upon such terms as the court deems just.

Material variances; how provided for.

§ 539. A variance, between an allegation in a pleading and the proof, is not material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defence, upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

Immaterial variances; how provided for.

§ 540. Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

What to be deemed a failure of proof.

§ 541. Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

Amendments of course.

§ 542. Within twenty days after a pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had. But if it is made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just.

Amended pleading to be served; answer thereto

§ 543. Where a pleading is amended, as prescribed in the last section, a copy thereof must be served upon the attorney for the adverse party. A failure to demur to, or answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to, or answer the original pleading.

Supplemental pleadings.

§ 544. Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof. The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken in the action is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon the case presented by the original and supplemental pleadings.

Motion to strike out irrelevant, etc., matter

§ 545. Irrelevant, redundant, or scandalous matter contained in a pleading, may be stricken out upon the motion of a person aggrieved thereby. Where scandalous matter is thus stricken out, the attorney, whose name is subscribed to the pleading, may be directed to pay the costs of the motion, and his failure to pay them may be punished as a contempt of the court.

Indefinite or uncertain allegations.

§ 546. Where one or more denials or allegations, contained in a pleading are so indefinite or uncertain that the precise meaning or application thereof, is not apparent, the court may require the pleading to be made definite and certain by amendment.

CHAPTER VII.

GENERAL PROVISIONAL REMEDIES IN AN ACTION.

TITLE I.—ARREST, PENDING THE ACTION, AND PROCEEDINGS THEREUPON.
TITLE II.—INJUNCTION.
TITLE III.—ATTACHMENT OF PROPERTY.
TITLE IV.—OTHER PROVISIONAL REMEDIES; GENERAL AND MISCELLANEOUS PROVISIONS.

TITLE I.

Arrest pending the action, and proceedings thereupon.

ARTICLE 1. Cases where an order of arrest may be granted, and persons liable to arrest.
2. Granting, executing, and vacating or modifying the order of arrest.
3. Discharging the defendant upon bail or deposit; justification of the bail and disposition of the deposit.
4. Charging and discharging bail.

ARTICLE FIRST.

CASES WHERE AN ORDER OF ARREST MAY BE GRANTED, AND PERSONS LIABLE TO ARREST.

SECTION 548. No person to be arrested in civil proceedings, without an express statutory provision.
549. When the right to arrest depends upon the nature of the action.
550. When the right to arrest depends partly upon extrinsic facts.
551. Order, when and where granted; when of right, and when discretionary.
552. Foreign judgment not to affect right to arrest.
553. Women not to be arrested, except, etc.
554. Idiot, lunatic, or infant under fourteen, not to be arrested. Discharge.
555. Persons sued in a representative capacity, not to be arrested.

§ 548. A person shall not be arrested in a civil action, or special proceeding, except as prescribed by statute. The writ of ne exeat is hereby abolished.

When the right to arrest depends upon the nature of the action.

§ 549. A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention, or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud; or deceit. But this subdivision does not apply to a claim for damages in an action to recover a chattel.

3. To recover money, funds, credits, or property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.

4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability.

Where such an allegation is made, the plaintiff cannot recover unless he proves the fraud; and a judgment for the defendant is not a bar to a new action to recover upon the contract only.

§ 550. A defendant may also be arrested as prescribed in this title, in either of the following cases:

1. In an action to recover a chattel, when the chattel, or a part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof.

2. In an action upon contract, express or implied, other than a promise to marry, where the defendant has, since the making of the contract, or in contemplation of making the same, removed or disposed of his property, with intent to defraud his creditors, or is about to remove or dispose of the same, with like intent.

3. In an action to recover for money received, or to recover property, or damages for the conversion or misapplication of property, where the money was received, or the property was embezzled, or fraudulently misapplied, by a public officer, or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment, or by a factor, agent, broker or other person in a fiduciary capacity. But this subdivision does not apply to an action to recover a chattel.

4. In an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual.

Order, when and where granted; when of right, and when discretionary.

§ 551. In a case specified in subdivision fourth of the last section, the order of arrest can be granted only by the court; is always in its discretion; and may be granted or served, either before or after final judgment, unless an appeal from the judgment is pending, upon which security has been given, sufficient to stay the execution thereof. In either of the other cases specified in the last two sections, the order cannot be served after final judgment; but it may be granted, where a proper case therefor is presented, at any time before final judgment.

Foreign judgment, not to affect right to arrest.

§ 552. The recovery of judgment in a court, not of the State, for the same cause of action; or, where the action is founded upon fraud or deceit, for the price or value of the property obtained thereby; does not affect the right of the plaintiff to arrest the defendant, as prescribed in this title.

Woman not to be arrested, except, etc.

§ 553. A woman cannot be arrested, as prescribed in this title, except in a case where the order can be granted only by the court; or where it appears that the action is to recover damages for a wilful injury to person, character or property.

Idiot, lunatic, or infant under fourteen, not to be arrested. Discharge.

§ 554. A lunatic, an idiot or an infant under the age of fourteen years, if arrested, may be discharged from arrest as a privileged person in the discretion of the court. The application for his discharge may be made, in his behalf, by a relative, or by any other person whom the court or judge permits to represent him, for the purpose.

Person sued in a representative capacity, not to be arrested.

§ 555. A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next of kin, assignee, or trustee, cannot be arrested, as prescribed in this title, except for his personal act.

ARTICLE SECOND.

GRANTING, EXECUTING, AND VACATING OR MODIFYING THE ORDER OF ARREST.

SECTION 556. Order required for arrest; how granted.
557. Proof necessary to procure order.
558. When order may be granted; effect of complaint subsequently made.
559. Security, upon order of arrest made by a judge.
560. Id.; upon order of arrest granted by the court.
561. Contents of the order; to whom directed; when to be executed.
562. Copies of papers to be delivered to defendant; originals to be filed.
563. Arrest; how made.
564. General provision as to privilege from arrest; discharge of privileged person.
565. Privilege of officers of courts.
566. Defendant arrested to have twenty days to answer.
567. When application to be made to vacate order of arrest, etc.
568. How and to whom application must be made; opposing it by new proofs.
*569, *570. Questions of fact arising on the motion.
*571. When prior motion not to prejudice subsequent motion.
572. Supersedeas, unless defendant is charged in execution, etc.

Order required for arrest; how granted.

§ 556. An order for the arrest of the defendant, except as otherwise prescribed in section five hundred and fifty-one of this act, must be obtained from a judge of the court in which the action is brought, or from any county judge.

Proof necessary to procure order.

§ 557. The order may be granted, in a case specified in section five hundred and forty-nine of this act, where it appears by the affidavit of the plaintiff, or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section. It may be granted, in a case specified in section five hundred and fifty of this act, upon the like proof that a sufficient cause of action exists against the defendant, as prescribed in that section, and of the other matters, extrinsic to the cause of action, specified in that section. The affidavit may also contain any statement, tending to determine the amount of bail to be required.

When order may be granted, effect of complaint subsequently made.

§ 558. Subject to the provisions of the last preceding article, the order may be granted at any time, after the commencement of the action. It may also be granted, to accompany the summons. But at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint fails to set forth a sufficient cause of action, as required by the last section.

Security upon order of arrest made by a judge.

§ 559. Except where the action is brought for a cause specified in subdivision third of section five hundred and forty-nine of this act, or in a case where it is specially prescribed by law that security may be dispensed with, or the security to be given is specially regulated by law, the judge, before he grants the order, must require a written undertaking on the part of the plaintiff, with two sufficient sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least equal to one-tenth of the amount of bail required by the order, and not less than two hundred and fifty dollars.

Id.; upon order of

§ 560. Where the order can be granted only by the court, an undertaking on the part of the plaintiff may be dispensed with. If it is re-

* Stricken out.

quired, its form, and the security to be given thereupon, must be such as the court prescribes. arrest granted by the court.

§ 561. The order must be subscribed by the plaintiff's attorney, and except where it is granted by the court, by the judge. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum; and to return the order, with his proceedings thereunder, as prescribed by law. The plaintiff's attorney may, at his option, by an indorsement upon the order, or, where it was granted by the court, upon the copy thereof, delivered to the sheriff, fix a time within which the defendant must be arrested. In that case, he cannot be arrested afterwards under the same order. Contents of the order; to whom directed; when to be executed.

§ 562. The order of arrest, or, where it was granted by the court, a certified copy thereof, subscribed by the plaintiff's attorney; and, in either case, the papers upon which the order was granted, with the undertaking, if any; must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. The papers, upon which the order was granted, with the undertaking, if any, must be filed, with the order of arrest, or a certified copy thereof, at the time prescribed for filing the same, in section five hundred and ninety of this act. Copies of papers to be delivered to defendant; originals to be filed.

§ 563. The sheriff must execute the order by arresting the defendant, if he is found within his county, and keeping him in custody, until discharged by law. Arrest; how made.

§ 564. This title does not abridge or affect a privilege from arrest given by law, or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest, where other provision is not made therefor by law, by the court, or a judge thereof; or by the county judge of the county, or a judge of a superior city court of the city where the arrest was made. The order must be made, upon proof by affidavit, of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest, after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff, or to the plaintiff, or to both. General provision as to privilege from arrest; discharge of privileged person.

§ 565. An officer of a court of record, appointed or elected pursuant to law, is privileged from arrest, during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or counsellor is not thus privileged, unless he is employed in a cause, to be heard at that term. Privilege of officers of courts.

§ 566. Except where an order of arrest can be granted only by the court, a defendant, arrested before answer, has twenty days after the arrest, in which to answer the complaint; and judgment must be stayed accordingly. Defendant arrested to have twenty days to answer.

§ 567. Except where an order of arrest can be granted only by the court, a defendant, arrested as prescribed in this title, may, at any time before final judgment, or, if he was arrested within twenty days before final judgment, at any time within twenty days after the arrest, apply to vacate the order of arrest; or to reduce the amount of bail; or to increase the security given by the plaintiff; or for one or more of those forms of relief, together, or in the alternative. In a case where the order of arrest can be granted only by the court, a like application may be made, at any time within twenty days after the arrest; and an application to increase the security given by the plaintiff, may be made at any time before final judgment. When application to be made to vacate order of arrest, etc.

TITLE I.

How and to whom motion must be made; opposing it by new proofs.

§ 568. An application, specified in the last section, may be founded only upon the papers upon which the order was granted; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper, and the application must be heard upon those papers only. Or it may be founded upon proof, by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the order was granted by a judge, out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground of arrest recited in the order, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.

Supersedeas, unless defendant is charged in execution, etc.

§ 572. Except in a case where an order of arrest can be granted only by the court, if the defendant is in actual custody, by virtue of an order of arrest in the action, and the plaintiff neglects to enter judgment in the action, within one month after it is in his power to do so; or neglects to issue execution against the person of the defendant, within three months after the entry of judgment; the defendant must, on his application, made upon notice to the plaintiff, be discharged from custody, by the court in which the action was commenced, or by a judge thereof, within the county where the defendant is in custody; unless reasonable cause is shown why the application should not be granted. A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon a judgment in the action.

ARTICLE THIRD.

DISCHARGING THE DEFENDANT UPON BAIL OR DEPOSIT; JUSTIFICATION OF THE BAIL AND DISPOSITION OF THE DEPOSIT.

SECTION 573. Defendant to be discharged on bail or deposit.
574. When defendant may elect to give bail, etc., or bond for liberties.
575. Undertaking of the bail; what to contain.
576. Examination of persons offered as bail.
577. Filing, etc., of papers; plaintiff's acceptance or rejection of bail.
578. Notice of justification; new undertaking, if other bail is given.
579. Qualifications of bail.
580. Justification of bail.
581. Allowance of bail.
582. Deposit of money with sheriff.
583. Payment of deposit into court by sheriff.
584. Substituting bail for deposit.
585. How deposit disposed of.
586. When deposit to be paid to a third person.
587. Sheriff, when liable as bail; his discharge from liability.
588. Proceedings on judgment against sheriff.
589. Bail liable to sheriff.
590. Filing papers if bail not given.

Defendant to be discharged on bail or deposit.

§ 573. The defendant, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit,

immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to see* for and to procure bail, before being committed to jail.

When defendant may elect to give bail, etc., or bond for liberties.

§ 574. Where the defendant is actually confined in the jail, by virtue of an order of arrest, and final or interlocutory judgment has been rendered against him in the action, but an execution against his person has not been issued, he may elect, either to give a bond for the liberties of the jail, or to give bail or make a deposit, as prescribed in this article.

Undertaking of the bail; what to contain.

§ 575. The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence and occupations, to the following effect:

1. If the order of arrest could be granted only by the court, that the defendant will obey the direction of court, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.

2. If the action is to recover a chattel, that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

3. In any other case, that the defendant will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment against him in the action.

Examination of persons offered as bail.

§ 576. It is not necessary that the undertaking should be approved, or accompanied with an affidavit of justification of the bail. But the officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and annexed to the undertaking.

Filing, etc., of papers; plaintiff's acceptance or rejection of bail.

§ 577. Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney copies, certified by him, of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail; otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability.

Notice of justification; new undertaking if other bail is given.

§ 578. Within ten days after the receipt of the notice, the sheriff or the defendant may serve upon the plaintiff's attorney, notice of the justification of the same or other bail, specifying the place of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where one of the bail resides, or where the defendant was arrested. If other bail are given, a new undertaking must be executed, as prescribed in section five hundred and seventy-five of this act.

Qualifications of bail.

§ 579. The qualifications of bail are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the State.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify, severally, in

sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail.

Justification of bail.

§ 580. For the purpose of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The judge may, in his discretion, adjourn the examination from day to day, until it is completed; but such an adjournment must always be to the next judicial day, unless by consent of parties. If required by the plaintiff's attorney, the examination must be reduced to writing, and subscribed by the bail.

Allowance of bail.

§ 581. If the judge finds the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability.

Deposit of money with sheriff.

§ 582. The defendant may, instead of giving bail, deposit with the sheriff the sum specified in the order. The sheriff must thereupon give the defendant a certificate of the deposit, and discharge him from custody.

Payment of deposit into court by sheriff.

§ 583. The sheriff must, within four days after the deposit, pay it into court. He must take, from the officer receiving it, two certificates of the payment, one of which he must deliver to the plaintiff, and the other to the defendant. For a default in making the payment, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.

Substituting bail for deposit.

§ 584. If money is deposited, as prescribed in the last two sections, bail may be given, and may justify upon notice, at any time before the expiration of the right to be discharged on bail. Thereupon the judge, before whom the justification is had, must direct, in the order of allowance, that the money deposited be refunded to the defendant, or his representative, and it must be refunded accordingly.

How deposit disposed of.

§ 585. If money deposited is not refunded, as prescribed in the last section, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case, if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied, under the direction of the court, in satisfaction of the judgment; and the surplus, if any, must be refunded to the defendant, or his representative. If the final judgment is for the defendant, or the action abates, or is discontinued, the sum deposited, and remaining unapplied, must be refunded to the defendant or his representative.

When deposit to be paid to a third person.

§ 586. At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction, to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof, but without expressing any other contingency. The direction must be acknowledged or proved, and certified, in like manner as a deed to be recorded; and the sheriff must deliver it to the officer who receives the deposit, who must note the substance thereof, with the entries of the deposit, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to the plaintiff's interest therein, and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying, or defrauding creditors. The money, or the residue thereof, must be paid to the third person, where, by the provisions of the last

two sections, it is required to be refunded to the defendant, or his representative.

§ 587. If, after the defendant is arrested, he escapes or is rescued, or the bail, if any, given by him, do not justify, when they are not accepted, or if the sheriff fails to pay the deposit into court as required by section five hundred and eighty-three of this act, the sheriff is liable as bail. But the sheriff may, except in an action to recover a chattel, discharge himself from liability, by the giving and justification of bail, as follows: Sheriff when liable as bail; his discharge from liability.

1. If the case is one where the order could be granted only by the court, at any time before the court directs the performance of the act specified in the order.

2. In any other case, at any time before an execution is issued against the person of the defendant, upon a judgment in the action.

§ 588. If judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the official bond of the sheriff may be prosecuted, as in any other case of delinquency. Proceedings on judgment against sheriff.

§ 589. The bail taken upon the arrest, unless they justify, or other bail are given and justify, are liable to the sheriff for all damages which he sustains by reason of the omission. Bail liable to sheriff.

§ 590. Within ten days after the defendant is arrested if he does not give bail, or if he gives bail, within ten days after the justification of the bail, the sheriff must file with the clerk the order of arrest, or, where it was granted by the court, the certified copy thereof delivered to him, with his return thereupon indorsed, the papers upon which the order of arrest was granted, and the undertaking given on the part of the plaintiff. Where an order of arrest, directing the arrest of two or more defendants, has been executed as to one or more, but not as to all of them, the sheriff may file a copy of the order of arrest, instead of the original. Filing papers if bail not given.

ARTICLE FOURTH.

CHARGING AND DISCHARGING BAIL.

SECTION 591. When defendant may be surrendered.
592. How surrender to be made; exoneration of bail thereupon.
593. Bail may arrest defendant.
594. Voluntary surrender; exoneration of bail thereupon.
595. Rights, etc.; of sheriff who is liable as bail.
596. Bail; how proceeded against.
597. Certain executions necessary before action against bail.
598. Duty of sheriff on such executions.
599. Defences in action against bail.
600. Relief of bail where principal is imprisoned on criminal charge.
601. Bail exonerated by death, etc.

§ 591. Except in an action to recover a chattel, the bail may surrender the defendant in their own exoneration, or the defendant may surrender himself in exoneration of the bail, before the expiration of the time to answer, in an action against them. The surrender must be made to the sheriff of the county, where the defendant was arrested. When defendant may be surrendered.

§ 592. Where the bail surrender the defendant, the surrender must be made in the following manner: How surrender to be made; exoneration of bail thereupon.

1. They must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody.

2. A certified copy of the undertaking of the bail must be delivered

TITLE 2.

Writ of injunction abolished, and order substituted.

§ 602. The writ of injunction has been abolished. A temporary injunction may be granted by order, as prescribed in this article.

Injunction, when the right thereto depends upon the nature of the action.

§ 603. Where it appears, from the complaint, that the plaintiff demands, and is entiled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act, as a case where the right to an injunction depends upon the nature of the action.

Id.; when the right thereto depends upon extrinsic facts.

§ 604. In either of the following cases, an injunction order may also be granted in an action:

1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

Restrictions upon injunction to restrain State officers.

§ 605. Where a duty is imposed by statute upon a State officer, or board of State officers, an injunction order to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the supreme court, at a general term thereof, sitting in the department in which the officer or board is located, or the duty is required to be performed; and upon notice of the application therefor to the officer, board, or other person to be restrained.

By whom injunction granted in othercases.

§ 606. Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court.

Proof necessary to procure injunction.

§ 607. The order may be granted, where it appears to the court or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor.

At what time the order may be granted.

§ 608. The order may be granted to accompany the summons, or at any time after the commencement of the action, and before final judgment.

When notice required or not required. Injunction pending an application.

§ 609. The order may be granted, upon or without notice in the discretion of the court or judge, unless the defendant has answered; in which case, it can be granted only upon notice, or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application.

Order must recite grounds; service of order.

§ 610. The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

ARTICLE SECOND.

SECURITY.

SECTION 611. Security, on staying proceedings in an action, before trial.
612. Id.; after trial, and before judgment.
613. Id.; after judgment.
614. Money deposited may be paid over.
615. Undertaking to be cancelled thereupon.
616. Security, on staying proceedings after verdict, in ejectment or dower.
617. Id.; damages to include waste.
618. Deposit may be dispensed with.
619. Undertaking and deposit; when dispensed with.
620. Security in other cases.
621. Special cases excepted.
*622. When undertaking deemed forfeited.
623. Damages; how ascertained.
624. Damages sustained by a third person.
625. Action on the undertaking.

Security, on staying proceedings in an action, before trial.

§ 611. An injunction order shall not be granted, to stay the trial of an action, in which the complaint demands judgment for a sum of money only, after issue has been joined therein, unless the party applying therefor gives an undertaking to the party enjoined, with sufficient sureties, to the effect, that he will pay to the party enjoined, or his representative, all damages and costs, which may be recovered by him in the action stayed by the injunction, not exceeding a sum, specified in the undertaking; and, also, all damages and costs that may be awarded to him, in the action in which the injunction order is granted.

Id.; after trial, and before judgment.

§ 612. An injunction order shall not be granted, to stay proceedings in an action specified in the last section, after verdict, report, or decision, and before final judgment thereupon, unless a sum of money, sufficient to cover the sum awarded by the verdict, report, or decision, and the costs of the action, is first paid, by the party applying for the injunction into the court, in which his action is commenced, or an undertaking for the payment thereof, with interest, is given, as prescribed in this article.

Id.; after judgment.

§ 613. An injunction order shall not be granted, to stay proceedings upon a judgment for a sum of money, unless the following requisites are complied with, by the party applying therefor:

1. The full amount of the judgment, including interest and costs, must be paid by him, into the court in which his action is commenced; or an undertaking in lieu thereof must be given, as prescribed in this article.

2. He must also give an undertaking, with sufficient sureties, to pay to the party enjoined, all damages and costs, which may be awarded to him by the court, in the action in which the injunction order is granted; not exceeding a sum, specified in the undertaking.

Money deposited may be paid over.

§ 614. Money paid into court, as prescribed in the last two sections, may be paid over, by the direction of the court, to the party whose proceedings are stayed, upon his giving an undertaking to the people of the State, with sufficient sureties, in a sum fixed by the court, to pay the money and interest, or any part thereof, as directed in the order or judgment of the court.

Undertaking to be cancelled thereupon.

§ 615. Where money so paid into court has been paid over to the party whose proceedings are stayed, if the final decision of the action, or

* Repealed.

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cancelled thereupon.

in which the injunction order is granted, is against the party obtaining it, the court must give such directions, as justice requires, with respect to cancelling the undertaking given by the successful party; making perpetual the injunction staying collection of the judgment; and requiring the judgment to be discharged of record.

Security on staying proceedings after verdict, in ejectment or dower.

§ 616. An injunction order shall not be granted, to stay proceedings in an action of ejectment, or for dower, after verdict, report or decision, unless the party applying therefor gives an undertaking, with sufficient sureties, to pay to the party enjoined, or his representative, all damages and costs, not exceeding a sum specified in the undertaking, which may be awarded to him, in the action wherein the injunction was granted.

Id.; damages to include waste.

§ 617. Where an undertaking is given, as prescribed in the last section, the damages to be paid, upon the vacating of the injunction order, or the decision of the action against the party obtaining it, include, not only the reasonable rents and profits of the real property, recovered by the verdict, report, or decision, but all waste committed upon the property, after the granting of the injunction.

Deposit may be dispensed with.

§ 618. In a case, where money is required by the foregoing sections of this article, to be paid into court, the court or judge may dispense with the payment, and may require the party to give, in lieu thereof, an undertaking, with two or more sureties, to pay the sum specified, with interest, as directed by the court. If an undertaking is required, in addition to the deposit, both undertakings may be contained in the same instrument, at the election of the party applying for the injunction.

Undertaking and deposit; when dispensed with.

§ 619. The foregoing sections of this article do not apply to a case, where an injunction order is applied for, to stay proceedings in another action, on the ground that a judgment, verdict, report, or decision therein was obtained by actual fraud. In that case, the court or judge granting the injunction order may dispense with the deposit of money, or the execution of an undertaking, except as prescribed in the next section.

Security in other cases.

§ 620. Where special provision is not otherwise made by law for the security to be given upon an injunction order, the party applying therefor must give an undertaking, executed by him or by one or more sureties, as the court or judge directs, to the effect, that the plaintiff will pay to the party enjoined, such damages, not exceeding a sum, specified in the undertaking, as he may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto.

Special cases excepted.

§ 621. The foregoing provisions of this article do not affect any special statutory provision, whereby security upon granting an injunction order may be dispensed with, in a particular case, or the security to be given in a particular case is otherwise regulated.

Damages, how ascertained.

§ 623. The damages, sustained by reason of an injunction, may be ascertained and determined by the court, or by a referee, appointed by the court, or by a writ of inquiry or otherwise as the court shall direct; and the decision of the court thereupon, or an order confirming the report of the referee, is conclusive, as to the amount of those damages, upon all the persons who have executed the undertaking, unless it is reversed upon appeal. The court may in its discretion, direct that the sureties have notice of the hearing, or of an appeal, and may prescribe the time and manner of giving them notice.

Damages sustained

§ 624. Where the defendant enjoined was an officer of a corporation, or joint stock association, or a bailee, agent trustee, or other represent-

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ative of another, and the damages sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

by a third person.

§ 625. Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in the last two sections, any person, entitled to the benefit of an undertaking, executed pursuant to the provisions of this title, may bring an action thereon, without further leave of the court.

Action on the undertaking.

ARTICLE THIRD.

VACATING OR MODIFYING AN INJUNCTION ORDER.

SECTION 626. Application to vacate or modify, without notice.
627. Id.; upon notice.
628. When prior motion not to prejudice subsequent application.
629. New undertaking may be required.
630. Verified answer to have the effect only of an affidavit.
*631. When merits of action may be litigated.
*632. When merits not to be litigated.
*633. Extrinsic questions of fact to be determined.
*634. Proof upon questions of fact.

§ 626. Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge who granted the order, or who held the term of the court where it was granted; or to the general term of the court, it cannot be made without notice, to any other judge or term, unless the applicant produces proof, by affidavit, that, by reason of the absence or other disability of the judge who granted the order, the application cannot be made to him; and that the applicant will be exposed to great injury, by the delay required for an application upon notice. The affidavit must be filed with the clerk; and a copy thereof, and of the order vacating or modifying the injunction order, must be served upon the plaintiff's attorney, before that order takes effect.

Application to vacate or modify without notice.

§ 627. Where the injunction order was granted without notice, or where it was granted upon notice, with leave to apply to vacate or modify it, the party enjoined may apply upon notice, to the judge who granted it, or to the court, at a term where a contested motion in the action may be heard, for an order, vacating or modifying the injunction order. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant: or both. Where it is founded upon proof on the part of the defendant, it may be opposed by new proof by affidavit, on the part of the plaintiff, tending to sustain the injunction.

Id.; upon notice.

§ 628. The granting or denial of an application, made as prescribed in the last section, founded only upon the papers upon which the injunction order was granted, does not prejudice a subsequent application, seasonably made, founded upon proof, by affidavit, on the part of the defendant. And the granting or denial of either ion does

When prior motion not to prejudice subsequent application.

* Stricken out.

not prejudice a subsequent application, seasonably made, founded upon the failure of a conplaint, which had not been made at the time of the former application, to set forth a cause of action, sufficient to entitle the plaintiff to the injunction order, upon one or more grounds, recited therein.

New undertaking may be required.

§ 629. Upon the hearing of an application, upon notice, to vacate or modify an injunction order, the court or judge may require a new undertaking, in the same or in a different sum, to be given by the plaintiff, with the like sureties, and to the like effect, as upon granting an original order. The persons executing the new undertaking become liable thereon, as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon, until the new undertaking is given and approved, and no longer.

Verified answer to have the effect only of an affidavit.

§ 630. Upon the hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

TITLE III.

Attachment of property.

ARTICLE 1. Cases where a warrant of attachment may be granted, and proceedings upon granting the same.
2. Executing the warrant pending the action.
3. Vacating or modifying the warrant; discharging the attachment.
4. Regulations where there are two or more warrants against the same defendant.
5. Proceedings after judgment; rights of parties and duties of the sheriff, after the warrant is vacated or annulled, or the attachment discharged.

ARTICLE FIRST.

CASES WHERE A WARRANT OF ATTACHMENT MAY BE GRANTED; AND PROCEEDINGS UPON GRANTING THE SAME.

SECTION 635. In what actions a warrant of attachment may be granted.
636. What must be shown to procure the warrant.
637. Warrant in action against public officer, etc., for peculation.
638. When and by whom the warrant may be granted.
639. Affidavits to be filed.
640. Security on obtaining warrant.
641. Contents of warrant; to whom directed.
642. Validity of undertaking.

In what actions a warrant of attachment may be granted.

§ 635. A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next session,* where the action is to recover a sum of money only as damages for one or more of the following causes:

*So in the original.

1. Breach of contract, express or implied, other than a contract to marry.

2. Wrongful conversion of personal property.

3. Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act.

What must be shown to procure the warrant.

§ 636. To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the State; or, if he is a natural person and a resident of the State, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the State, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent.

Warrant in action against public officer, etc., for peculation.

§ 637. A warrant of attachment, against the property of one or more defendants in an action, may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only; and it appears, by affidavit, that the action is brought to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted or disposed of; or in the obtaining, reception, payment, conversion, or disposition of which, without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof. In order to entitle the plaintiff to a warrant of attachment, in a case specified in this section, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant, for a sum, stated in the affidavit.

When and by whom the warrant may be granted

§ 638. The warrant may be granted by a judge of the court, or by any county judge to accompany the summons or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in this act; and if publication has been, or is thereafter commenced, the service must be made complete, by the continuance thereof.

Affidavits to be filed.

§ 639. The plaintiff procuring the warrant must, within ten days after the granting thereof, cause the affidavits, upon which it was granted, to be filed in the office of the clerk.

Security on obtaining warrant.

§ 640. The judge, before granting the warrant, must require a written undertaking, on the part of the plaintiff, with sufficient sureties, to

TITLE 3.

the effect, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs, which may be awarded to the defendant, and all damages, which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars. But this section does not apply to a case, where the action is brought for a cause specified in section six hundred and thirty-seven of this act, or where it is specially prescribed by law that security may be dispensed with, or where the security to be given is specially regulated by law.

Contents of warrant; to whom directed.

§ 641. The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time, to sheriffs of different counties.

Validity of undertaking.

§ 642. It is not a defence to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

ARTICLE SECOND.

Executing the Warrant, pending the Action.

*Section 643. Judge who granted warrant controls its execution; power of the court thereupon.
644. Sheriff must attach property of defendant.
645. What interest in real property may be attached.
646. Attachment of unpaid subscription to foreign corporation.
647. Id.; interest in corporation.
648. Id.; negotiable securities.
649. How property to be attached.
650. Certificate of defendant's interest to be furnished.
651. Person refusing certificate may be examined.
652. Rights of owner or master of vessel on which goods have been shipped.
653. Foregoing section not to apply in certain cases.
654. Sheriff must make inventory.
655. Sheriff may maintain actions.
656. Perishable goods to be sold.
657. Claim of property; how tried.
658. Proceedings, if claimant succeeds.
659. Finding, not to prejudice right of claimant.
660. Proceedings on claim to domestic vessel.
661. Appraisers to be sworn; valuation to be returned.
662. Undertaking to be given.
663. Vessel; when to be discharged.
664. When undertaking to be sued.
665. Defence in such an action; plaintiff's recovery
666. Foreign vessel; how valued.
667. Notice thereof.
668. Plaintiff to give undertaking with sureties.
669. Vessel; when to be discharged.
670. Terms on which debtor may claim vessel.
671, 672, 673. When vessel to be sold.
674. Sheriff to keep property.

* Stricken out.

SECTION 675. Sheriff may be directed to pay money into court.
676. When he may be directed to release or deliver property.
677. Plaintiff may bring action in name of himself and the sheriff.
678. How leave to bring such an action procured.
679. Plaintiff may be joined with sheriff, after action commenced.
680. Judge to direct as to management of such an action, etc.
681. Return of inventory; how enforced.

Sheriff must attach property of defendant.

§ 644. The sheriff must immediately execute the warrant, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of, as prescribed in this title. The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount, for which it was issued, has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

What interest in real property may be attached.

§ 645. The real property, which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant.

Attachment of unpaid subscription to foreign corporation.

§ 646. Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

Id.: interest in corporation.

§ 647. The rights or shares which the defendant has in the stock of an association or corporation, together with the interests and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had, when they were so attached.

Id.; bond, note, etc.

§ 648. The attachment may also by levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable, or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, State, county, public officer, association, municipal or other corporation, or by a private person, either within or without the State; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby.

How property to be attached.

§ 649. A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as the notice of the pendency of an action.

2. Upon personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any a copy of the warrant, and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interest or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof.

Certificate of defendant's interest to be furnished.

§ 650. Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared, or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

Person refusing certificate may be examined.

§ 651. If a person, to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

Rights of owner or master of vessels of which goods have been shipped.

§ 652. Except as otherwise prescribed in the next section, the owner or master of a vessel, on board of which goods of a defendant, against whom a warrant of attachment is issued, have been shipped for transportation, without reshipment or transshipment in the State, to a port or place without the State, may transport and deliver them according to their destination, notwithstanding the warrant; unless the plaintiff, his agent, or attorney, executes to the owner or the master of the vessel, a written undertaking, with sufficient sureties, in a sum specified therein, to pay him all expenses, damages, and charges, which may be incurred by him, or to which he may be subjected, for unlading the goods from the vessel, and for all necessary detention of the vessel, for that purpose. The undertaking must be approved, with respect to its form, the sum specified therein, and the sufficiency of the sureties, by a judge of the court, or the county judge of the county wherein the vessel is situated, or, in the city and county of New-York, by a judge of a superior city court within that city and county.

Foregoing section not to apply in certain cases.

§ 653. The last section does not apply, where the owner or master, before the shipment of the goods, had actual information of the granting of the warrant, or where he has, in any wise, connived at, or been *privy* to, the shipment thereof, for the purpose of screening them from *legal process*, or of hindering, delaying, or defrauding creditors.

Sheriff must make inventory.

§ 654. The sheriff must, immediately after levying under a warrant of attachment, make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, and of the books, vouchers, and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and must within five days after the levy, be filed in the office of the clerk of the county, where the property is attached.

Sheriff property; tain actions.

§ 655. The sheriff must, subject to the direction of the court or judge collect and receive all debts, effects, and things in action, attached by him. He may maintain any action or special proceeding, in his own name, or in the name of the defendant, which is necessary, for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding, at such time and on such terms, as the court or judge directs.

Perishable goods and animals to be sold.

§ 656. If property attached, other than a vessel, is perishable, the court or judge may, by an order, made with or without notice, as the urgency of the case, in its or his opinion, requires, direct the sheriff to sell it at public auction; and thereupon the sheriff must sell it accordingly. If it consists of live animals the same proceedings may be had, but such notice shall be given to the parties to the action, of the application for the order as the court or judge prescribes. The order directing the sale must prescribe the time and place of the sale, and notice thereof, must be given in such manner, and for such time as is prescribed in the order. The sheriff must retain in his hands the proceeds of the sale, after deducting his expenses, as allowed by the court or judge.

Claim of may maintain how tried.

§ 657. If the goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, the sheriff may, in his discretion, empanel a jury to try the validity of the claim.

Proceedings, if claimant succeeds.

§ 658. If, by their inquisition, the jury find the property of the goods or effects to have been in the claimant at the time of the levy, the sheriff must forthwith deliver them to him or his agent; unless the plaintiff gives an undertaking, with sufficient sureties, to indemnify the sheriff for the detention thereof. If the undertaking is given, the sheriff must detain the goods or effects, as the property of the defendant.

Finding not to prejudice right of claimant.

§ 659. If the property is found to be in the defendant, the finding does not prejudice the right of the claimant to bring an action, to recover the goods or effects, or the value thereof.

Proceedings on claim to domestic vessel.

§ 660. Where a vessel, belonging to a port or place in the United States, or a share or interest therein, is attached, the court or judge, on the application, within thirty days thereafter, of a person claiming title thereto, or of his agent, must appoint three indifferent persons to make a valuation thereof.

Appraisers to be sworn; valuation to be returned.

§ 661. A valuation of a vessel, or of a share or interest therein, made as prescribed in this article must be in writing, and subscribed by the appraisers; each of whom must take and subscribe an affidavit, annexed thereto, to the effect, that the valuation is, in all respects, just and fair, and that the value of the vessel, share, or interest, is truly

stated therein, according to the deponent's belief. The valuation must be immediately returned to the court or judge; and, after an undertaking is given, or after the expiration of the time to give an undertaking, as prescribed in the next section, it must be delivered to the sheriff.

Undertaking to be given.

§ 662. Within two days after the valuation is returned, the claimant or his agent may execute an undertaking to the sheriff, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that, in an action to be brought on the undertaking, the claimant will establish that he was the owner of the vessel, share or interest, at the time of the levy thereupon; and that, in case of his failure to do so; he will pay the amount of the valuation, with interest from the date of the undertaking, to the sheriff; or, if the warrant is vacated or annuled, to the defendant, or his personal representative.

Vessel; when to be discharged.

§ 663. Upon such an undertaking being executed and delivered to the sheriff, the court or judge must make an order, directing the vessel or share to be discharged from the attachment. Thereupon the sheriff must discharge the same accordingly.

When undertaking to be sued.

§ 664. The court or judge may, upon the application of either party, at any time before the warrant is vacated or annulled, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions, and under such regulations, between him and the applicant, as it or he deems just. And if the warrant of attachment is vacated or annulled, the defendant in the attachment, his assignee or personal representative, may commence and maintain an action upon the undertaking, or may be substituted, in place of the sheriff, in an action pending thereupon.

Defence in such an action; plaintiff's recovery.

§ 665. In such an action, the claimant may show, in bar of a recovery, that he was the owner of the vessel, share, or interest at the time when it was attached. If judgment passes against him, the plaintiff is entitled to recover the amount of the valuation, with interest from the date of the undertaking.

Foreign vessel, how valued.

§ 666. Where a foreign vessel, or a share or interest therein, is attached, it must be valued, as prescribed in sections six hundred and sixty and six hundred and sixty-one of this act, upon the application of a person, who makes affidavit, to the effect that he is the owner thereof, or that he is the agent of a person, naming him and his residence, whom he believes to be the owner of the vessel, share or interest attached.

Notice thereof.

§ 667. Such notice of the application must be given to the plaintiff, as the court or judge deems reasonable.

Plaintiff to give undertaking with sureties.

§ 668. Within three days after the valuation is returned, the plaintiff must give, to the person in whose behalf the claim is made, an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will pay such damages as may be recovered for seizing the vessel, share, or interest, in an action brought against the sheriff, or the plaintiff in the attachment, within three months from the approval of the undertaking, if it appears therein that the vessel, share, or interest belonged, at the time of attaching it, to the person in whose behalf the claim is made.

Vessel; when to be discharged.

§ 669. Unless such an undertaking is given, the court or judge must grant an order discharging the vessel, share, or interest so claimed, from the attachment; whereupon the sheriff must discharge the same accordingly

Terms on which debtor may claim vessel.

§ 670. If, after such an undertaking is given by the plaintiff, the warrant is vacated or annulled, or the attachment is discharged as to the vessel, share or interest, the defendant or his agent is entitled to claim the same, or the proceeds thereof, if it has been sold, only upon his showing, to the satisfaction of the court or judge, that the undertaking has been discharged; or giving to the plaintiff an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that they will indemnify the plaintiff against all charges and expenses, in consequence of the undertaking.

When vessel to be sold.

§ 671. If the undertaking of the plaintiff is not discharged, or he is not indemnified, as prescribed in this article, within one month after the defendant becomes entitled to claim the vessel, share, or interest, as so prescribed, it may be sold by the sheriff, in whose custody it is, upon an order of the court or judge; and the proceeds of the sale must be paid to the persons who executed the undertaking, for their indemnity.

The same.

§ 672. If a claim is not made, by or in behalf of an owner of a domestic vessel, or of a share or interest therein, within thirty days after it is attached, or if the proper undertaking is not executed by the claimant; or if a claim is not made, within that time, by or in behalf of the owner of a foreign vessel, or of a share or interest therein; the vessel, share, or interest, may be sold by the sheriff, under an order of the court or judge, upon the application of the plaintiff, if, in the opinion of the court or judge, a sale is necessary.

The same.

§ 673. Where a share or interest in a vessel, foreign or domestic, is attached, if the proper claim to it is not made, by or in behalf of an owner thereof, within thirty days thereafter, it may be sold by the sheriff, under an order of the court or judge, upon the application of a joint owner, or his agent.

Sheriff to keep property.

§ 674. The sheriff must keep the property attached by him, or the proceeds of property sold, or of a demand collected by him, to answer any judgment that may be obtained against the defendant in the action.

Sheriff may be directed to pay money into court.

§ 675. But the court upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of a demand collected, or property sold; or to deposit them in a designated bank or trust company, to be drawn out only upon the order of the court.

When he may be directed to release or deliver property.

§ 676. Where the proceeds of the property sold, and of the demands collected by the sheriff, exceed the amount of the plaintiff's demand, with the costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands, chargeable upon the same; the court, or the judge who granted the warrant, upon the application of the defendant, or of an assignee of, or purchaser from the defendant, and upon notice to the plaintiff, and the plaintiffs in the other warrants or executions, may, at any time during the pendency of the action, make an order, directing the sheriff to pay over the surplus to the applicant, and to release from the attachment the remaining real and personal property attached.

Plaintiff may bring action in name of himself and the sheriff

§ 677. The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this title, may be brought by the sheriff, to recover property attached, or the value thereof, or a de-

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mand attached, or upon an undertaking given as prescribed in th title, by a person other than the plaintiff. The sheriff must receive t proceeds of such an action, but he is not liable for the costs or expens thereof. Costs may be awarded, in such an action, against the plai tiff in the warrant, but not against the sheriff.

How leave to bring such action procured.

§ 678. The court or judge must grant leave to bring such an actio where it appears, that due notice of the application therefor has be given to the sheriff; but, before doing so, the court or judge may requi that notice of the application be given to the plaintiff, in any other wa rant against the same defendant. And such terms, conditions, a regulations may be imposed, in the order granting leave, as the co or judge thinks proper, for the due protection of the rights and interes of all persons, interested in the disposition of the proceeds of the actio

Plaintiff may be joined with sheriff, after action commenced.

§ 679. Leave may, in like manner and with like effect, be granted the plaintiff in the warrant, to be joined with the sheriff, in an acti brought by the sheriff, in a case where he might have procured lea to bring the action, as prescribed in the last two sections. Upon an a plication therefor, the court or judge may, in a proper case, require t plaintiff to provide for the expenses in the action, already incurred the sheriff. The application must be denied, in case of an unreasona ble delay in making it; or where an application was made, before t action was brought, and the plaintiff neglected or refused, without good excuse therefor, to comply with the terms, conditions or regu tions then imposed.

Judge to direct as to management of such an action, etc.

§ 680. The court or judge may, upon the application of the sheri or of the defendant in the warrant, during the pendency of an actio brought as prescribed in the last three sections, direct as to the co duct, discontinuance, or settlement of the same, and as to the appli tion or disposition of the money or property recovered therein, as ju tice requires.

Return of inventory; how enforced.

§ 681. Upon the application of either party, and proof of the negle of the sheriff, the court or judge may, by order, require the sheriff return an inventory. Disobedience to such an order may be punishe as a contempt of the court.

ARTICLE THIRD.

Vacating or modifying the Warrant; discharging the Attachment.

Section 682. Motion to vacate or modify warrant, or increase security.
683. How motion must be made; opposing it by new proofs.
*684, *685. Questions of fact arising on the motion.
686. When prior motion not to prejudice subsequent motion.
687. Defendant may apply for discharge of attachment.
688. Undertaking to be given.
689. Application by one of several defendants.
690. Sureties to justify if required.
691. Sheriff may retain property until justification.
692. Foregoing provisions applicable to vessels.
693. Partners may apply to discharge attachment.
694. Undertaking to be given.
695. Court or judge may ascertain value.
696. When plaintiff entitled to notice of any application, etc.

Motion to vacate or modify

§ 682. The defendant, or a person who has acquired a lien upon, interest in, his property, after it was attached, may, at any time befo

* 684, 685 Stricken out.

the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security, given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative. warrant, or increase security.

§ 683. An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof, by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial. How motion must be made; opposing it by new proofs.

§ 686. The denial of such an application does not prejudice a subsequent application, *seasonable made, founded upon the failure of a complaint, which had not been filed or served at the time of the former application, to set forth any of the causes of action, mentioned in section six hundred and thirty-five and section six hundred and thirty-seven of this act. When prior motion not to prejudice subsequent motion.

§ 687. The defendant may, at any time after he has appeared in the action, and before final judgment, apply to the judge who granted the warrant, or to the court for an order to discharge the attachment, as to the whole or a part of the property attached. Defendant may apply for discharge of attachment

§ 688. Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. Undertaking to be given.

§ 689. Where there are two or more defendants, and an application is made, as prescribed in the last two sections, by one or more, but not by all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof, by affidavit, to the satisfaction of the court or judge, that the property, with respect to which the application is made, belongs to him separately; in which case, the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant, either alone or jointly with any other defendant. Where an application is made, as prescribed in this section, at least two days notice thereof, with a copy of the affidavit, must be served upon the plaintiff's attorney, who may oppose the application by proof, by affidavit, that one or more of the other defendants own, or have an interest in the property. Application by one of several defendants.

*So in the original.

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Sureties to justify if required.

§ 690. An undertaking, given as prescribed in the last two sections, must be forthwith filed with the clerk. A copy thereof, with a notice of the filing must be forthwith served upon the plaintiff's attorney; who may, within three days thereafter, give notice to the sheriff, that he excepts to the sufficiency of the sureties. Thereupon the sureties must justify, upon the like notice, and in like manner, as bail upon an arrest; or a new undertaking must be given, with new sureties, who must justify in like manner. If the plaintiff does not except, as prescribed in this section, he is deemed to have waived all objection to the sureties.

Sheriff may retain property until justification.

§ 691. The sheriff is responsible for the sufficiency of the sureties: and he may retain possession of the property attached, and the proceeds thereof, until the objection to them is waived, as prescribed in the last section, or they, or the new sureties, justify.

Foregoing provisions applicable to vessels.

§ 692. The last five sections are applicable, where a vessel, or a share or interest therein is attached. If it is necessary, to enable the defendant to discharge the attachment, the court or judge may, by order, stay any proceedings specified in article second of this title, or extend the time to do any act therein specified.

Partners may apply to discharge attachment.

§ 693. If a warrant of attachment is levied upon the interest of one or more partners, in goods or chattels of a partnership, the other partners, who are not defendants in the action, or any of them, may at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.

Undertaking to be given.

§ 694. Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, the amount of any judgment, which may be recovered against the partner who is defendant in the action; or which may be recovered against him, in any other action, wherein the other partners are not defendants, and wherein a warrant of attachment, or an execution, may come to the sheriff's hands, at any time before the warrant of attachment, which was so levied, is vacated or annulled; not exceeding a sum, specified in the undertaking, which must not be less than the value of the interest of the defendant, in the goods or chattels seized by virtue of the attachment, as fixed by the court or judge; if the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.

Court or judge may ascertain value.

§ 695. For the purpose of fixing the sum, or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference.

When plaintiff entitled to notice of any application, etc.

§ 696. The court or judge may direct, that the plaintiff have notice of an application for a discharge of property, as prescribed in this article, or of the hearing under an order of reference, made as prescribed in the last section; and, if the applicant does not appear, where notice has been given, the application may be dismissed or denied.

ARTICLE FOURTH.

REGULATIONS WHERE THERE ARE TWO OR MORE WARRANTS AGAINST THE SAME DEFENDANT.

SECTION 697. Preferences of two or more warrants.
698. Rule as to levy under a junior warrant.
*699. Subsequent warrants to be under control of judge, who issued first warrant.
*700. The last section qualified.
701. Undertaking, by junior attaching creditor, to prevent release of foreign vessel.
702. Rule as to subsequent attachment of foreign vessel.
703. Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.
704. Junior plaintiff may be allowed to commence action jointly with sheriff.
705. Rights of third and other subsequent attaching creditors.

Preferences of two or more warrants.

§ 697. Where two or more warrants of attachment, against the same defendant, are delivered to the sheriff of the same county, to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior warrant, are the same, as where two or more executions, against the property of the same defendant, are delivered to the sheriff of the same county, to be executed.

Rules as to levy under a junior attachment.

§ 698. Where a domestic vessel, or a share or interest therein, has been attached, and afterwards released, as prescribed in this title; or where the personal property of a partnership, of which the defendant was a member, has been attached, and the attachment afterwards discharged, upon the application of another partner, as prescribed in this title; another warrant, against the same defendant, shall not be levied on the same property, by the sheriff of the same or of any other county, until after the first warrant has been vacated or annulled. But, except as thus prescribed, where a second warrant, against the same defendant, is delivered to the same sheriff, he must execute it, by a levy upon property within his county, and he must thereupon take the same proceedings, as if the levy was made under the first warrant.

Undertaking, by junior attaching creditor, to prevent release of foreign vessel.

§ 701. Where a foreign vessel, or a share or interest therein, has been attached and valued, as prescribed in article second of this title, and the plaintiff, in the first warrant of attachment, fails to give an undertaking to prevent the release thereof, the court or judge may grant to the plaintiff in a second warrant, then in the sheriff's hands for execution, an extension, of not more than three days thereafter, within which to furnish an undertaking, in all respects like the one to be furnished by the first plaintiff. And if he furnishes it, within that time, he has the same rights and privileges, and is subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if his was the first warrant.

Rule as to subsequent attachment of foreign vessel.

§ 702. If a foreign vessel, or a share or interest therein, has been attached, and afterwards released, by reason of the failure of the plaintiff, in the first or the second warrant, to give an undertaking to prevent the release, it shall not be again attached, under warrant against the same defendant, which had been delivered to the sheriff of the same county, before the expiration of the time within which the undertaking should have been furnished. But it may be again attached, under a subsequent warrant against the same defendant; in which case,

*Stricken out.

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the plaintiff therein, and the plaintiff in each warrant subsequently delivered to the sheriff, have the same rights, and privileges, and are subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if the warrant, under which it was attached, was the first warrant.

Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.

§ 703. Where the plaintiff in a warrant of attachment has commenced an action, in the name of himself and the sheriff jointly, as prescribed in this title, a plaintiff in a junior warrant may apply to the court or judge, to direct as to the conduct, discontinuance, or settlement of the same, or to impose terms, conditions, and regulations as to the continuance thereof, in the interest of the applicant; and such order may be made thereupon, as justice requires. If the first warrant is vacated, or the attachment thereunder is released or discharged, without affecting the cause of action prosecuted by the plaintiff therein and the sheriff jointly, the plaintiff in the warrant next in order, may, upon his own application, be substituted as joint plaintiff with the sheriff, by an order, made as upon an application for leave to bring such an action.

Junior plaintiff may be allowed to commence action jointly with sheriff.

§ 704. A plaintiff in a second warrant may apply to the court or judge, upon notice to the plaintiff in the first warrant, and to the sheriff, for leave to bring and maintain, in the name of himself and the sheriff jointly, any action, which might be brought in the name of the senior plaintiff and the sheriff. If it appears that the plaintiff in the first warrant neglects or refuses to be joined with the sheriff in such an action, or to comply with the terms, conditions, and regulations, imposed, either upon granting him an order for that purpose, or upon the hearing of an application, made as prescribed in this section, the court or judge may grant to the plaintiff in the second warrant, leave to bring and maintain such an action, in the name of himself and the sheriff jointly, with like effect, as if his was the first warrant.

Rights of third and other subsequent attaching creditors.

§ 705. Where there are more than two warrants of attachment, against the same defendant, the plaintiffs in the third and each subsequent warrant have, according to their respective priorities, the same rights and privileges, as against the plaintiffs in all senior warrants, which the plaintiff in the second warrant has, as against the plaintiff in the first, and are subject to the same duties and liabilities; except that a second extension of the time, within which to furnish an undertaking to prevent the release of a foreign vessel, or a share or interest therein, shall not be granted. And the plaintiffs in two or more junior warrants of attachment, may, by agreement among themselves, take jointly, and for their common benefit, any proceeding, permitted by this title to be taken, by the plaintiff in a second or subsequent warrant of attachment; provided that it does not interfere with the preferential or other right of an intermediate plaintiff.

ARTICLE FIFTH.

PROCEEDINGS AFTER JUDGMENT; RIGHTS OF PARTIES AND DUTIES OF THE SHERIFF, AFTER THE WARRANT IS VACATED OR ANNULLED, OR THE ATTACHMENT DISCHARGED.

SECTION 706. Execution to issue to sheriff who has levied.
707. Only attached property bound when summons not personally served.
708. Judgment in the principal action; how satisfied.
709. When attachment discharged, etc., property to be restored to defendant.

SECTION 710. Additional provision for his relief.
711. Cancelling notice attaching real property.
712. When sheriff to return warrant and his proceedings.

Execution to issue to sheriff who has levied.

§ 706. Where a levy, under a warrant of attachment in an action, has been made, an execution against property, upon a final judgment in favor of the plaintiff therein, recovered after the expiration of the term of office of the sheriff, who made the levy, must nevertheless be directed to an* executed by that sheriff, unless another person is designated by law to complete the unfinished business pertaining to his office; or, in that case, to the person so designated.

Only attached property bound, when summons not personally served.

§ 707. Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation.

Judgment in the principal action; how satisfied.

§ 708. Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it, as follows:

1. He must pay over to the plaintiff all money attached by him, and all proceeds of the sales of perishable property, or of any vessel, or share or interest therein, or animals, sold by him, or of any debts or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

2. If any balance remains due, he must sell, under the execution, the other personal property attached, or so much thereof as is necessary; including rights or shares in the stock of an association or corporation, or a bond or other instrument for the payment of money, executed and issued with the interest coupons annexed, if any, by a government, State, county, public officer, or municipal or other corporation, which is in terms negotiable, or payable to the bearer or holder, the principal whereof is not then payable; but not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires him to satisfy it out of any other personal property of the defendant, he must sell the personal property, upon which he has levied by virtue of the execution. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title, and interest, which the defendant had in the real property attached, at the time when the notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff without having been sold or converted into money, and the attachment has not been discharged, as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

*So in the original.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court, upon the petition of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used diligence, in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected; may direct the sheriff to sell the remaining portion, upon such terms, and in such manner, as it thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served on the defendant, and he did not appear, the court may make such order as to the service of notice, as it thinks proper; or may grant the application without notice.

When attachment discharged, etc., property to be restored to defendant.

§ 709. Where a warrant of attachment is vacated, or annulled, or an attachment is discharged, upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges, and expenses, legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged; or the proceeds thereof, if it has been sold by him.

Additional provision for his relief.

§ 710. Where the sheriff is required, by this title, to deliver attached property, or the proceeds thereof, to the defendant, he must also deliver to him, unless otherwise specially directed by the court or judge, all books of account, vouchers, evidences of debt, muniments of title, or other papers, relating to the property, either real or personal, or to its proceeds; together with all undertakings, relating thereto, which he has taken in the course of the proceedings, and which have not been fully satisfied; except an undertaking, given by the defendant, upon the discharge of property. He must also deliver a written assignment duly acknowledged, of each undertaking, so delivered, and of each other instrument, to which the defendant is thus entitled, an assignment of which is necessary to perfect or protect the defendant's title thereto. The defendant must also, but upon his own application only, be substituted in the place of the sheriff, or the sheriff and the plaintiff jointly, in an action brought as prescribed in this title; but the court or judge may impose, as a condition of granting the order of substitution, such terms as justice requires, with respect to indemnity and payment of expenses. The defendant's rights, with respect to property attached and not disposed of, and an undertaking, or other instrument, to which he is thus entitled, are the same as those of the sheriff while the warrant was still in force, except where his rights are specially defined or regulated by law.

Cancelling notice attaching real property.

§ 711. At any time after the warrant of attachment has been vacated or annulled, or the attachment has been discharged as to real property attached, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as it deems just, direct that any notice, filed for the purpose of attaching the property, be cancelled of record, by the clerk of the county where it is filed and recorded. The cancellation must be made by a note, to that effect, on the margin of the record, referring to the order; and, unless the order is entered in

the same clerk's office, a certified copy thereof must, at the same time, be filed therein.

When sheriff to return warrant and his proceedings.

§ 712. Where a warrant of attachment has been vacated or annulled, the sheriff must forthwith file, in the clerk's office, the warrant, with a return of his proceedings thereon. Upon the application of either party, and proof of the sheriff's neglect, the court may direct him so to do, forthwith, or within a specified time.

TITLE IV.

Other provisional remedies; general and miscellaneous provisions.]

ARTICLE 1. Receivers.
2. Deposit, delivery, or conveyance of property.
3. General and miscellaneous provisions.

ARTICLE FIRST.

RECEIVERS.

SECTION 713. Receiver; when appointed.
714. Notice of application.
715. Security.
716 Certain receivers may hold real property.

Receiver; when appointed.

§ 713. In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court, a superior city court, or a county court, may be appointed by the court, in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.

2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.

3. After final judgment, to preserve the property, during the pendency of an appeal.

The word "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

Notice of application.

§ 714. Notice of an application, for the appointment of a receiver, in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order has been made, as prescribed in section four hundred and thirty-eight of this act, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as it thinks proper.

Security.

§ 715. A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond, to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver. And the court; or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed; or his successor in office; may, at any time remove the receiver, or direct him to give a new bond, with new sureties, with the like condition.

But this section does not apply to a case, where special provisi made by law, for the security to be given by a receiver, or for inc ing the same, or for removing a receiver.

Certain receivers may hold real property.

§ 716. A receiver, appointed by or pursuant to an order or a j ment, in an action in the supreme court, a superior city court, county court, or in a special proceeding for the voluntary dissol of a corporation, may take and hold real property, upon such trust for such purposes as the court directs, subject to the direction of court, from time to time, respecting the disposition thereof.

ARTICLE SECOND.

DEPOSIT, DELIVERY, OR CONVEYANCE OF PROPERTY.

SECTION 717. Court may order a deposit or delivery of property in certain ca
718. When sheriff may take and convey, etc., property.

Court may order a deposit or delivery of property in certain cases.

§ 717. Where it is admitted, by the pleading or examination party, that he has, in his possession or under his control, mone other personal property capable of delivery, which, being the sul of the action or special proceeding, is held by him as trustee for an party, or which belongs or is due to another party, the court ma its discretion, grant an order upon notice, that it be paid into, o posited in court, or delivered to that party, with or without secu subject to the further direction of the court.

When sheriff may take and convey, etc., property.

§ 718. Where the court has directed a deposit or delivery, as scribed in the last section; or where a judgment directs a part make a deposit or delivery, or to convey real property; if the dire is disobeyed, the court, besides punishing the disobedience as a tempt, may, by order, require the sheriff to take, and deposit or de the money or other personal property, or to convey the real prop in conformity with the direction of the court.

ARTICLE THIRD.

GENERAL AND MISCELLANEOUS PROVISIONS.

SECTION 719. Arrest, injunction and attachment; when not to be granted toge
720. Motions relating to provisional remedies to be decided in twenty

Arrest, injunction, and attachment; when not to be granted together.

§ 719. Where application for an order of arrest, an injunction, a warrant of attachment, or two of them, is made, in the same ac against the same defendant; and it satisfactorily appears that, u the particular circumstances of the case, two or all of them are necessary for the plaintiff's security, the court or judge may, in i his discretion, require the plaintiff to elect between them. Whe

Motions relating to provisional remedies to be decided in twenty days.

application is made to obtain, vacate, modify, or set aside an ord arrest, injunction order, or warrant of attachment, the court or j must finally decide the same, within twenty days after it is subm for decision.

Right of a defendant interposing a counterclaim.

§ 720. Where the defendant interposes a counterclaim and t upon demands an affirmative judgment against the plaintiff, his to a provisional remedy is the same as in an action brought by against the plaintiff, for the cause of action stated in the counterc and demanding the same judgment. And for the purpose of appl to such a case the provisions of this act, the defendant is deeme plaintiff, the plaintiff is deemed the defendant, and the counterc so set forth in the answer is deemed the complaint.

CHAPTER VIII.

MISCELLANEOUS INTERLOCUTORY PROCEEDINGS, AND REGULATIONS OF PRACTICE.

TITLE I. — MISTAKES, OMISSIONS, DEFECTS, AND IRREGULARITIES.
TITLE II. — TENDER, AND OTHER OFFERS AND REQUESTS TO THE ADVERSE PARTY.
TITLE III. — PAYMENT OF MONEY INTO COURT, AND CARE AND DISPOSITION THEREOF.
TITLE IV. — PROCEEDINGS UPON THE DEATH OR DISABILITY OF A PARTY, OR THE TRANSFER OF HIS INTEREST.
TITLE V. — MOTIONS AND ORDERS GENERALLY.
TITLE VI. — MISCELLANEOUS PRACTICE REGULATIONS.

TITLE I.

Mistakes, omissions, defects, and irregularities.

SECTION 721. Defects cured by verdict, etc., and by judgment.
722. Such defects to be supplied.
723. Amendments by the court; disregarding immaterial errors, etc.
724. Relief against omissions, etc.; amendments to conform proceedings.
725. Returns by officers, etc.
726. Papers lost or withheld; how supplied.
727. Order of court; when necessary to amend.
728. Disregarding defects in affidavits.
729. Certain bonds, etc., when sufficient.
730. Amending defects in bonds, etc.

§ 721. In a court of record, where a verdict, report, or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters, or things, in the process, pleadings, or other proceedings: Defects cured by verdict, etc., and by judgment.

1. For want of a summons, or other writ.
2. For any fault or defect in process: or for misconceiving a process, or awarding it to a wrong officer.
3. For an imperfect or insufficient return of a sheriff or other officer; or because an officer has not subscribed a return, actually made by him.
4. For a variance between the summons and complaint.
5. For a mispleading, insufficient pleading,* or jeofail.
6. For want of a warrant of attorney by either party.
7. For the appearance, by attorney, of an infant party, if the verdict, report, or decision, or the judgment, is in his favor.
8. For omitting to allege any matter, without proof of which the verdict, report, or decision ought not to have been rendered.
9. For a mistake in the name of a party or other person; or in a

* so in the original.

sum of money; or in the description of property; or in reciting or stating a day, month or year; where the correct name, sum, description, or date has been once rightly stated, in any of the pleadings or other proceedings.

10. For a mistake in the name of a juror or officer.

11. For an informality in entering judgment, or making up the judgment-roll.

12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced.

Such defects to be supplied.

§ 722. Each of the omissions, imperfections, defects, and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court.

Amendments by the court; disregarding immaterial errors, etc.

§ 723. The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceeding to the facts proved. And, in every stage of the action, the court must disregard an error or defect in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

Relief against omissions, etc.; amendments to conform proceedings.

§ 724. The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. Where a proceeding, taken by a party, fails to conform to a provision of this act, the court may, in like manner, and upon like terms, permit an amendment thereof, to conform it to the provision.

Returns by officers, etc.

§ 725. A court, to which a return is made by a sheriff or other officer, or by a subordinate court or other tribunal, may, in its discretion, direct the return to be amended, in matter of form, either before or after judgment.

Papers lost or withheld; how supplied.

§ 726. Where an original pleading or paper is lost, or withheld by any person, the court may authorize a copy to be filed and used, instead of the original.

Order of court; when necessary to amend.

§ 727. A process, pleading, or record, shall not be altered, by the clerk or any other officer of the court, or by any other person, without the direction of the court, or of another court of competent authority; except in a case where a party, or his attorney, is specially authorized by law to amend a pleading.

Disregarding defects in affidavits.

§ 728. The want of a title, or a defect in the title, of an affidavit, does not impair it, if it intelligibly refers to the action or special proceeding, in which it is made.

Certain bonds, etc., when sufficient.

§ 729. A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit it is given.

§ 730. Where such a bond or undertaking is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution. Amending defects in bonds, etc.

TITLE II.

Tender, and other offers and requests to the adverse party.

SECTION 731. Tender after suit.
732. Amount to be paid into court.
733. Effect of sufficient tender.
734. When to be deducted from recovery, etc.
735. Requiring admission of genuineness of paper.
736. Offer to liquidate damages conditionally.
737. Effect of refusal of offer.
738. Defendant's offer to compromise; proceedings thereon.
739. Plaintiff's offer to compromise counterclaim; proceedings thereon.
740. Offer and acceptance, by whom subscribed.
* 741. Rule if offer made within ten days before trial.
* 742. In certain cases, judgment to be set aside.

§ 731. Where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation; or to recover damages for a casual or involuntary personal injury, or a like injury to property; the defendant, or his attorney, may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money, as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand; together with the costs of the action, to that time. Tender after suit.

§ 732. A tender, made as prescribed in the last section, does not avail the defendant, unless the money is accepted, or is paid into court, and notice thereof in writing served upon the plaintiff's attorney before the trial, and within ten days after the tender. If the plaintiff takes out the amount paid in he accepts the tender. Amount to be paid into court.

§ 733. If it appears, upon the trial, that the sum so tendered was sufficient to pay the plaintiff's demand, or to make amends for the injury, and also to pay the costs of the action, to the time of the tender, the plaintiff cannot recover costs or interest, from the time of the tender, but must pay the defendant's costs from that time. Effect of sufficient tender.

§ 734. If the plaintiff proceeds in the action, after accepting the tender, the sum accepted must be deducted from the recovery, and judgment rendered for the residue, if any; and if the tender and acceptance do not appear in the pleadings, a memorandum thereof must be annexed to the judgment-roll. The plaintiff's right to recover costs, and his liability to pay costs to the defendant, are determined by the amount of the residue. When to be deducted from recovery, etc.

§ 735. The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party, a paper, material to the action, and request a written admission of its genuineness. If the admission is not given, within four days after the request, and the paper Requiring admission of genuineness of paper.

* Stricken out.

TITLE 2.

is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial, and paid by the party refusing the admission; unless it appears, to the satisfaction of the court, that there was a good reason for the refusal.

Offer to liquidate damages conditionally.

§ 736. In an action to recover damages for breach of a contract, the defendant's attorney may, with the answer, serve upon the plaintiff's attorney, a written offer, that, if the defendant fails in his defence, the damages may be assessed at a specified sum. If the plaintiff serves notice, that he accepts the offer, with or before the notice of trial, and damages are awarded to him on the trial, they must be assessed accordingly.

Effect of refusal of offer.

§ 737. If the plaintiff does not accept the offer, he cannot prove it, upon the trial. But if the damages, awarded to him, do not exceed the sum offered, the defendant is entitled to recover the expenses, necessarily incurred by him in preparing for the trial of the question of damages. The expenses must be ascertained, and the amount thereof determined, by the judge, or the referee, by or before whom the cause is tried.

Defendant's offer to compromise; proceedings thereon.

§ 738. The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

Plaintiff's offer to compromise counter-claim; proceedings thereon.

§ 739. Where the defendant sets up a counterclaim, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, the plaintiff may serve, upon the defendant's attorney, a written offer, to allow judgment to be taken against him, for a specified sum, with costs, or against the defendant for a specified sum, and against the plaintiff for costs. If the defendant, within ten days thereafter, serves, upon the plaintiff's attorney, notice that he accepts the offer, either party may file the summons, complaint, answer, and offer, or copies thereof and proof of acceptance; and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence, upon the trial; but, if the recovery is not more favorable to the defendant than that so offered, he will not be entitled to recover costs from the time of the offer, but must pay costs from that time.

Offer and acceptance, by whom subscribed.

§ 740. Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it and annex thereto his affidavit, to the effect that he is duly authorized to make it, in behalf of the party.

TITLE III.

Payment of money into court, and care and disposition thereof.

SECTION 743. Party bringing money into court is discharged.
744. General rules may regulate concerning payment into court.
745. Money to be paid to county treasurer, and securities taken in his name.
746. Funds; where and how deposited or invested.
747. Powers of supreme court as to transfer, etc., to and investment by guardian, etc.
748. When other courts have like power.
749. Powers of certain officers, touching securities, etc.
750. Provisions relating to death, removal, etc., of officer.
751. Authority for payment of money by bank or trust company.
752. How county treasurer to keep his accounts.
753. County treasurer to report annually to the court.
754. These provisions applicable in New York to the chamberlain.

Party bringing money into court is discharged.

§ 743. A party bringing money into court, pursuant to the direction of the court, is discharged thereby from all further liability, to the extent of the money so paid in.

General rules may regulate concerning payment into court.

§ 744. The general rules of practice may contain regulations, concerning the payment of money into court, in an action, and the care and disposition thereof, which shall govern, where provision is not otherwise made by law.

Money to be paid to county treasurer, and securities taken in his name.

§ 745. Unless the court otherwise specially directs, money, paid into court, must be paid, either directly, or by the officer who is required by law first to receive it, to the county treasurer of the county, where the action is triable. Where it is paid to an officer, other than the county treasurer, he must pay it to the county treasurer, within four days after he receives it. In the city of New-York, he must pay it to the chamberlain, within two days after he receives it. A bond, mortgage, or other security, or a certificate or transfer of stock, taken upon the investment of money paid into court, must be taken to the county treasurer of the county where the fund belongs, in his name of office; or to such other county treasurer, as the court specially directs. But this and the next section do not prevent the court, upon the application of a party to an action, from directing in what manner or place, money, paid into court in the action, shall be deposited or invested.

Funds; where and how deposited or invested.

§ 746. Provision may be made, in the general rules of practice, for the deposit, in a bank or trust company, of money paid into court; for the investments thereof in the public debt of the United States, or of a State, or for loaning it upon approved interest-bearing mortgages upon real property; and for the transferring or disposing, from time to time, of the money, or any investment, or security. But the money must be deposited or loaned in the county where the fund belongs, where that can be done conveniently and safely, and with advantage to the parties interested.

Powers of supreme court as to transfer, etc., to and investment by guardian, etc.

§ 747. The supreme court may direct that money, paid into that court, in an action brought therein, or a bond, mortgage, or other security, or public stock, in the possession or under the control of a county treasurer, which represents money so paid in, be transferred and delivered to a general or special guardian, committee, or other trustee, upon his giving, or if he has given, security, satisfactory to the court, for the faithful execution of his trust; or that a bond, mortgage, or other

TITLE 3.

security, or public stock, be taken by and in the name of the guardian, committee, or other trustee; and be collected, invested or loaned, as the court directs, or as prescribed in the general rules of practice.

When other courts have like power.

§ 748. Each superior city court, each county court, and the marine court of the city of New-York, possesses, with respect to money, paid into that court, in an action brought therein, or a bond, mortgage, or other security, or public stock, in or upon which it has been invested or loaned, the power and authority conferred upon the supreme court, by the last section.

Powers of certain officers, touching securities, etc.

§ 749. A county treasurer, or other officer, or a guardian, committee, or other trustee, in whose name is taken a bond, mortgage, or other security, or public stock, representing money, paid into court, in an action; or to whom stock or a security, or an account, deed, voucher, receipt, or other paper, representing or relating to such money, is transferred, delivered, made, or given, pursuant to law, is vested with title for the purposes of the trust; and may bring an action upon or in relation to the same, in his official or representative character.

Provision relating to death, removal, etc., of officer.

§ 750. On the expiration of the official term of a county treasurer, or where a vacancy occurs in his office, by death or otherwise, all public stock, bonds, mortgages, and other securities held by him, as prescribed in this title, vest in his successor in office; and all money deposited, as prescribed in this title, in a bank, trust company or other depository, to his credit, vests in, and must be carried to, the account of his successor in office.

Authority for payment of money by bank or trust company.

§ 751. Money, paid into court, in an action, and deposited in a bank or trust company, to the credit of a county treasurer, shall not be paid out, without the production of a certified copy of an order of the court, for that purpose, countersigned by the judge, by whose direction it is made.

How county treasurer to keep his accounts.

§ 752. The accounts of a county treasurer, with respect to money received by him, as prescribed in this title, with each bank or trust company, in which it is deposited, must be kept, so as to show, in the cash-books of the bank or company, and in the books of the county treasurer, in what particular action, or on what account, each item of money credited or charged, was deposited or paid out.

County treasurer to report annually to the court.

§ 753. A county treasurer, who has, in his possession or under his control, money, bonds, mortgages, or other securities, or public stock, as prescribed in this title, must, once in each year, at the time prescribed by special order, or by the general rules of practice, make a report to the court, into which the money was paid, containing a statement of his accounts for the preceding year, or since the last account was rendered, and of the funds and securities under his control, relating to the money paid into that court. The statement must show, as to each action separately, the amount on hand uninvested; the time when each sum of money was received; the time, amount, and other description of each payment, investment, or loan; the amount deposited in each bank or trust company; and the balance on deposit therein; and also all public stock, bonds, mortgages and other securities, representing the remainder of the fund. The statement must be accompanied with a certificate of the proper officer of each bank or trust company, in which a deposit is made, to the effect, that the total amount, stated to be remaining on deposit, is actually in that bank or company, placed to the credit of the county treasurer, in the action, and not mingled with any other account. If the court, at any time, deems the security given by the county treasurer insufficient to protect

the funds and securities in his hands and under his control, it must make an order directing him to make the security satisfactory to the court.

§ 754. Each provision of this title, relating to a county treasurer, applies to the chamberlain of the city of New York, with respect to money paid into court, in an action triable in the city and county of New York, or with respect to money, or a bond, mortgage, or other security, or public stock, representing money paid into court; except where special provision, with respect to the same, is otherwise made by law.

These provisions applicable in New York to the chamberlain.

TITLE IV.

Proceedings upon the death or disability of a party, or the transfer of his interest.

SECTION 755. Action; when not to abate.
756. Proceedings upon transfer of interest, or devolution of liability.
757. Id.; when sole party dies and action survives.
758. Id.; when one of several parties dies.
759, 760. Id.; when part of cause of action survives.
761. When court may order action abated.
762. Special cases excepted.
763. Death of party after verdict, etc.
764. Action for a wrong not to abate after verdict, etc.
765. No verdict, etc., can be taken after a party's death.
766. Death, etc., of public officer or trustee.

§ 755. An action does not abate by any event, if the cause of action survives or continues.

Action; when not to abate

§ 756. In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.

Proceedings upon transfer of interest, or devolution of liability.

§ 757. In case of the death of a sole plaintiff, or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative, or successor in interest.

Id.; when sole party dies and action survives.

§ 758. In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of or against the survivors. But the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter, and, when the liability is several as well as joint, may order a severance of the action so that it may proceed separately against the represen-

Id.; when one of several parties dies.

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tative of the decedent, and against the surviving defendant or defendants.

Id.; when part of cause of action survives.

§ 759. In case of the death of one of two or more plaintiffs, or one of two or more defendants, if part only of the cause of action, or part or some of two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. But where it appears proper so to do, the court may require or to* compel the successor, or a person who claims to be the successor, to be brought in as a party, upon his own application or upon the application of a party to the action.

The same.

§ 760. In a case specified in the foregoing sections of this title, where such a person applies in his own behalf, the court may direct that he be made a party, by amendment of the pleadings, or otherwise, as the case requires. Where an application is made by the plaintiff, to bring in such a person as defendant, the court may direct that a supplemental summons issue, and that supplemental pleadings be made. Where an application is made by a defendant, to bring in such a person, the court may, and where the protection of the applicant's rights requires it, must, permit the defendant to commence a cross action for that purpose. The cross action must be brought in the same court, unless the order otherwise specially directs. If it directs that the action be commenced in another court, the latter court may, by order, at any time after the cross action is commenced, remove to itself the original action, with like effect as if it had been brought therein. Unless the court otherwise directs, the original action and the cross action must be tried, and judgment rendered therein, as if they were one action.

When court may order action abated.

§ 761. At any time after the death of the plaintiff, or after the marriage of the plaintiff, where it affects the rights of either party, the court may, in its discretion, upon notice to such persons as it directs, and upon the application of the adverse party, or of a person whose interest is affected, direct that the action abate, unless it is continued by the proper parties, within a time specified in the order, not less than six months, nor more than one year, after the granting thereof.

Special cases excepted.

§ 762. The foregoing provisions of this title do not apply to a case, where special provision is otherwise made by law.

Death of party after verdict, etc.

§ 763. If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside.

Action for a wrong not to abate after verdict, etc.

§ 764. After verdict, report, or decision, in an action to recover damages for a personal injury, the action does not abate by the death of a party, unless the verdict, report, or decision is finally set aside. Until it is finally set aside, the subsequent proceedings, including an appeal from an order setting it aside, or from a judgment or order reversing or setting aside a judgment entered thereupon, are the same, as in a case where the cause of action survives.

No verdict, etc., can be taken after a party's death.

§ 765. This title does not authorize the entry of a judgment against a party, who dies before a verdict, report, or decision is actually rendered against him. In that case the verdict, report, or decision is absolutely void.

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* So in the original.

TITLE 5.

Death, etc., of public officer or trustee.

§ 766. Where an action or special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or by a receiver, or other trustee, appointed by virtue of a statute, his death or removal does not abate the action or special proceeding; but the same may be continued by his successor, who must, upon his application, or that of a party interested, be substituted for that purpose, by the order of the court, a copy of which must be annexed to the judgment-roll.

TITLE V.

Motions and orders generally.

SECTION 767. Definition of an order.
768. Id.; of a motion.
769. Motions in supreme court; where to be heard.
770. Motions in New York city.
771. In absence of judge, motion may be transferred to another judge.
772, 773. What judges may make orders out of court, without notice.
774. Review of order made by county judge.
775. When stay of proceedings not to exceed twenty days.
776. Subsequent application for order, after denial, etc., of prior application.
777. Id.; as to application for judgment.
778. Penalty for violating last two sections.
779. Costs of a motion; how collected.

Definition of an order.

§ 767. A direction of a court or judge, made, as prescribed in this act, in an action or special proceeding, must be in writing, unless otherwise specified in the particular case. Such a direction, unless it is contained in a judgment, is an order.

Id.; of a motion.

§ 768. An application for an order is a motion.

Motions in supreme cour; where to be heard.

§ 769. A motion, upon notice, in an action in the supreme court, must be made within the judicial district, in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district, the motion must be made in that district; and a motion, upon notice, cannot be made in that district in an action triable elsewhere. But this section does not apply to a case, where it is specially prescribed by law that a motion may be made in the county, where the applicant, or other person to be affected thereby, or the attorney, resides.

Motions in New York city

§ 770. In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits.

In absence of judge, motion may be transferred to another judge.

§ 771. Where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made.

§ 772. Where an order, in an action, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the State; or, except to stay proceedings after verdict, report, or decision by a justice of the Supreme Court, or by a judge of a superior city court within the city wherein his court is located, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. Where such an order grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case, it may be vacated or modified, without notice, by the judge who made it, or, upon notice, by him, or by the court.

same.

§ 773. The limitation, contained in the last section, of the county judges who may make an order, does not apply to a case where it is prescribed in this act, in general words, that a particular order may be made by a county judge or by any county judge.

view of der made judge of nother ourt.

§ 774. An order, made by a judge of a court, other than the court in which the action is pending, may be reviewed in the same manner, as if it was made by a judge of the court, in which the action is pending.

When stay f proceed- ngs not to exceed wenty lays.

§ 775. An order to stay proceedings in an action, for a longer time than twenty days, shall not be made by a judge, out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application, to the adverse party, or in cases where special provision is otherwise made by law.

ubse- uent ap- lication or order fter de- ial, etc., f prior ap- lication.

§ 776. If an application for an order, made to a judge of the court, or to a county judge, is wholly or partly refused, or granted conditionally, or on terms; a subsequent application, in reference to the same matter, and in the same stage of the proceedings, shall be made only to the same judge, or to the court. If it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it; or, if he is absent, or otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts.

d.; as to application or judg- ment.

§ 777. Where an application is made to the court for judgment, it cannot be withdrawn, without the express permission of the court; and a subsequent application for judgment shall not be made, at a term held by another judge, except where the first application is so withdrawn; or where the directions, given thereupon, require an act to be done, before judgment can be rendered; or where the fact of the former application is stated, and the proceedings thereupon, and subsequent thereto, are fully set forth, in the papers upon which the application is made.

Penalty for violating ast two ections.

§ 778. A person making an application, forbidden by the last two sections, with knowledge of the previous application, shall be punished by the court, for a contempt.

§ 779. Where costs of a motion, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after service of a copy of the order, all proceedings on the part of the party required to pay them, except to review or vacate the order, are stayed, without further direction of the court, until the payment thereof. But the adverse party may, at his election, waive the stay of proceedings. Where the order directs that the costs of the motion abide the event of the action, or where costs of a motion, awarded by an order, have not been collected, when final judgment is entered, they may be taxed, as part of the costs of the action, or set off against costs awarded to the adverse party, as the case requires.

TITLE VI.

Miscellaneous practice regulations.

ARTICLE 1. General regulations respecting time.
2. Preferred and deferred causes.
3. Service of papers.
4. Discovery of books and papers.
5. General regulations respecting bonds and undertakings.
6. Other matters.

ARTICLE FIRST.

GENERAL REGULATIONS RESPECTING TIME.

SECTION 780. Notice of motion, to be eight days.
781. How time enlarged, before its expiration.
782. Copy of affidavit must be served.
783. Relief, after time has expired.
784. When time cannot be extended.
785. Qualification of last section.
786. Orders in certain actions; how published.
787. Time for publication of notice; how computed.
788. Time for doing any act; how computed.

Notice of motion, to be eight days.

§ 780. Where special provision is not otherwise made by law, or by the general rules of practice, if notice of a motion, or of any other proceeding in an action, before a court or a judge, is necessary, it must, if personally served, be served at least eight days before the time appointed for the hearing; unless the court or a judge thereof, upon an affidavit showing grounds therefor, makes an order to show cause, why the application should not be granted; and, in the order, directs that service thereof, less than eight days before it is returnable, be sufficient.

How time enlarged, before its expiration.

§ 781. Where the time, within which a proceeding in an action after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action.

Copy of affidavit must be served.

§ 782. In a case specified in the last two sections, the affidavit, upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise, the order may be disregarded.

Relief after time has expired.

§ 783. After the expiration of the time, within which a pleading must be made, or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law.

When time cannot be extended.

§ 784. A court, or a judge, is not authorized to extend the time, fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the

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order, as the case may be, for doing it; except in a case specified in the next section.

Qualification of last section.

§ 785. Where a party, entitled to appeal from a judgment or order, or to move or set aside a final judgment for error in fact, dies, either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.

Orders in certain actions; how published.

§ 786. Where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published, once in each week, for at least three successive weeks, and as much longer as the court directs, in the newspaper, published at Albany, in which legal notices are required to be published, and in a newspaper, published in the county where the act is required to be done.

Time for publication of notice; how computed.

§ 787. The period of publication of a legal notice, in an action or special proceeding, brought in a court, either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication.

Time for doing any act; how computed.

§ 788. The time within which an act, in an action or special proceeding, brought, as specified in the last section, is required by law to be done, must be computed, by excluding the first, and including the last day; except where it is otherwise specially prescribed by law. If the last day is Sunday, or a public holiday, it must be excluded. Where the act is required to be done within two days, and an intervening day is Sunday, or a public holiday, it must also be excluded.

ARTICLE SECOND.

PREFERRED AND DEFERRED CAUSES.

SECTION 789. Preference of certain actions by the people.
790. Id.; of criminal actions.
791. Id.; among civil actions.
792. Id.; in mandamus or prohibition.
793. When an order is necessary.
794. When cause passed, how placed upon the calendar.
795. Note of issue to state time when passed.

Preference of certain actions by the people.

§ 789. A trial, motion, appeal, or hearing, in an action by the people to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise for, or in behalf of, a public or governmental interest, by a municipal or other public corporation, or by a board, officer, custodian, agency or agent of the State, or of a city, county, town, village, or other division, subdivision,

department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; is entitled, on the application of the Attorney-General, to a preference over any other business, at a term or sitting of any court of the State, irrespective of its place upon the calendar.

Id.; of criminal actions.

§ 790. A criminal action, including an appeal or other proceeding in a criminal cause, is entitled, under the direction of the court, to preference in the trial or hearing thereof, over all civil actions and special proceedings, except as prescribed in the last section.

Id.; among civil actions

§ 791. Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

1. An action or special proceeding brought by or against the people of the State, or by or against any State officer or board of State officers as such, and in which the people, or such officer or board, appear by the Attorney-General; where the Attorney-General has given notice, at the time of service of notice of trial or argument, of a particular day in the term on which he will move it. If the action or special proceeding is not moved by him for trial or argument on that day, or as soon thereafter in the same term as the court can hear it, the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term, except by the special order of the court.

2. An action or special proceeding, in which a board of officers exercising powers conferred by a statute for the protection of public health, or public or private property, or for the prevention or punishment of violations of a statute relating to either of those subjects, or the commissioners of pilots in the city of New York are parties; where a notice, similar to the notice prescribed in the last subdivision, has been served by their attorney, at the time of service of the notice of trial or argument. The provisions of the last subdivision, relating to moving the trial or argument, apply to a cause within this subdivision.

3. In the court of appeals or the supreme court, an appeal taken by either party, in action or special proceeding other than as specified in subdivision first of this section, where the people of the State, or a board of State officers, are sole parties, or a State officer is a sole party, plaintiff or defendant.

4. In the court of appeals, an action, a party to which has died, pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party.

5. In any court, an action, in which an executor or administrator is the sole plaintiff or sole defendant; an action for the construction of, or an adjudication upon, a will, in which the administrator with the will annexed, or the executor of the will, is joined, as plaintiff or defendant, with one or more other parties; an action in which a receiver of a savings bank is sole plaintiff or sole defendant; and, in the court of appeals or the supreme court, an appeal from the decree or decision of a surrogate's court, determining a will to be valid, and admitting it to probate, or granting general letters of administration.

6. An action for dower; where the plaintiff makes proof, by affidavit, to the satisfaction of the court, or a judge thereof, that she has no sufficient means of support, aside from the estate in controversy.

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7. An action against a corporation or joint-stock association, issuing bank notes, or any kind of paper credits, to circulate as money; or by or against a receiver of such a corporation or association.

8. An action against a corporation founded upon a note, or anothers* evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals, or to stay the execution on an appeal to the court of appeals.

9 An action against a sheriff, in his official capacity.

10. A cause entitled to preference, by the general rules of practice, or by the special order of the court in the particular case.

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing the preference given by this section affects only the order, in which the issues or questions of the same nature are to be disposed of.

Id.; in mandamus or prohibition.

792. Where a writ of mandamus or of prohibition has been issued, from the general term, to a special term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the court of appeals, in the discretion of that court, be preferred over any of the causes specified in the last section.

When an order is necessary

§ 793. Where the right to a preference depends upon facts, which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor, from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served, with or before the notice of trial or argument. Such an order is not appealable; but it may be vacated by the judge or judges holding the term, at which the preferred cause is noticed for trial or hearing. But a preliminary order is not requisite, in a case embraced within subdivision first or second of the last section but one; and the order, in a case embraced within subdivision sixth thereof, may be made ex parte, and is conclusive.

When cause passed, how placed upon the calendar.

§ 794. Where an action or special proceeding, placed upon the calendar of a term of a court of record, held in the city and county of New York, is regularly called and passed, without a postponement by the court, for good cause shown, it must thenceforth be placed on the same or a future calendar, as if the date of the issue was the time when it was thus passed.

Note of issue to state time when passed.

§ 795. In a case specified in the last section, the party placing the cause upon the calendar, for a subsequent term, must state, in the note of issue, the date of the issue, as prescribed in that section. If he omits to do so, by reason whereof the cause retains its priority on the calendar, the court, on the application of the adverse party, or of its own motion, may strike the cause from the calendar.

ARTICLE THIRD.

Service of Papers.

Section 796. Paper may be served personally.
797. Other modes of service.
798. Double time when served through the post-office.
799. When paper to be served on attorney; when service not required.
800. When service may be made on clerk, for non-resident.
801. Service through branch post-office in New York city.
802. This article not applicable to service of summons, etc.

*So in the original.

ART. 3.

Paper may be served personally.

§ 796. A notice or other paper in an action, may be served on a party or an attorney, either by delivering it to him personally, or in the manner prescribed in the next section.

Other modes of service.

§ 797. Where the service is not personal, it may be made as follows:

1. Upon a party or an attorney, through the post-office, by depositing the paper, properly inclosed in a post-paid wrapper, in the post-office of the party or the attorney serving it, directed to the person to be served, at the address, within the State, designated by him for that purpose, upon the preceding papers in the action; or, where he has not made such a designation, at his place of residence, or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

2. Upon an attorney, during his absence from his office, by leaving the paper with his partner or clerk therein, or with a person having charge thereof.

3. Upon an attorney, if there is no person in charge of his office, and the service is made between six o'clock in the morning and nine o'clock in the evening, either by leaving it, in a conspicuous place in his office, or by depositing it, inclosed in a sealed wrapper, directed to him, in his office letter-box; or, if the office is not open, so as to admit of leaving the paper therein, and there is no office letter-box, by leaving it at his residence, within the State, with a person of suitable age and discretion.

4. Upon a party, by leaving the paper at his residence within the State, between six o'clock in the morning and nine o'clock in the evening, with a person of suitable age and discretion.

Double time when served through the post-office.

§ 798. Where it is prescribed in this act, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post-office, the time so required or allowed is double the time specified; except that service of notice of trial may be made, through the post-office, not less than sixteen days before the day of trial, including the day of service.

When paper to be served on attorney; when service not required.

§ 799. Where a party has appeared, a notice or other paper, required to be served in an action, must be served upon his attorney. If a defendant has not appeared, service of a notice or other paper, in the ordinary proceedings in the action, need not be made upon him, unless he is actually confined in jail, for want of bail.

When service may be made on clerk, for non-resident.

§ 800. Where a party to an action, who has appeared in person, resides without the State, or his residence cannot, with reasonable diligence, be ascertained, and he has not designated an address, within the State, upon the preceding papers, service of a paper upon him may be made, by serving it on the clerk.

Service through branch post-office in New York city.

§ 801. In the city of New-York, where a paper is served, or a return is made, through the post-office, the deposit of the package in a branch post-office has the same effect, as a deposit in the general or principal post-office of that city.

This article not applicable to service of summons, etc.

§ 802. This article does not apply to the service of a summons, or other process; or of a paper to bring a party into contempt; or to a case where the mode of service is specially prescribed by law.

ARTICLE FOURTH.

Discovery of Books and Papers.

Section 803. Court may direct discovery of books, etc.
804. Rules to prescribe the cases, etc.
805. Petition for discovery, and order thereupon.
806. Order, when and by whom vacated.
807. Proceedings upon the return of the order.
808. Penalty for disobedience.
809. Effect of papers, etc., produced.

Court may direct discovery of books, etc.

§ 803. A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy, of a book, document, or other paper, in his possession or under his control, relating to the merits of the action, or of the defence therein.

Rules to prescribe the cases, etc.

§ 804. The general rules of practice must prescribe the cases, in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.

Petition for discovery, and order thereupon.

§ 805. To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge authorized to make an order in the action; upon which an order may be made, directing the party, against whom the discovery or inspection is sought, to allow it, or, in default thereof, to show cause before the court, at a time and place, and upon a notice, therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings be stayed until the hearing of the application, although the stay exceeds twenty days.

Order, when and by whom vacated.

§ 806. An order, made as prescribed in the last section, may be vacated, by the judge who granted it, or by the court, upon satisfactory proof, by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or,

2. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document, or other paper, directed to be produced or inspected.

Proceedings upon the return of the order.

§ 807. Upon the return of the order to show cause, the court may make such an order, with respect to the discovery or inspection prayed for, as justice requires. Where either is directed, a referee may be appointed by the order, to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and, except in proceedings for contempt, conclusive evidence, of compliance or non-compliance with the terms of the order. A fixed sum, not exceeding twenty dollars, may be added to the costs of the motion, for the fees of the referee.

Penalty for disobedience.

§ 808. Where an order, made as prescribed in the last section, directs a discovery or inspection, the party in whose behalf it was made, may, upon proof, by affidavit, that the adverse party has failed to obey it, and upon notice to him, apply to the court, for an order to punish him for the failure. Upon the hearing of the application, the court may, upon the payment of such a sum, for the expenses of the applicant, as the court fixes, and upon compliance with such other terms, as it deems

just to impose, permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed, or his answer or reply be stricken out, and that judgment be rendered accordingly; or it may make an order, striking out one or more causes of action, defences, counterclaims, or replies, interposed by him; or that he be debarred from maintaining a particular claim or defence, in relation to which the discovery or inspection was sought. Where the party has failed to obey an order, allowing an inspection by the adverse party, and requiring him to furnish a copy, or permit a copy to be taken, the court may also direct that the book, document, or other paper, be excluded from being given in evidence; or it may punish the party for a contempt; or both.

Effect of papers, etc., produced.

§ 809. A book, document, or other paper, produced under an order, made as prescribed in this article, has the same effect, when used by the party requiring it, as if it was produced upon notice, according to the practice of the court.

ARTICLE FIFTH.

General Regulations respecting Bonds and Undertakings.

Section 810. Bonds, undertakings, etc., must be acknowledged.
811. Party need not join with his sureties; when one surety is sufficient.
812. Form of bond or undertaking; affidavit of sureties; approval by court or judge.
813. When several sureties may justify, each in a smaller sum.
814. Bonds, etc., to the people or a public officer for the benefit of a suitor.
815. Bonds, etc., not affected by change of parties.
816. Id.; to be filed.

Bonds, undertakings, etc., must be acknowledged.

§ 810. A bond or undertaking, given in an action or special proceeding, as prescribed in this act, must be acknowledged or proved, and certified, in like manner as a deed to be recorded.

Party need not join with his sureties; when one surety is sufficient.

§ 811. Where a provision of this act requires a bond or undertaking, with sureties, to be given by, or in behalf of, a party or other person, he need not join with the sureties in the execution thereof, unless the provision requires him to execute the same; and the execution thereof by one surety is sufficient, although the word, "sureties," is used, unless the provision expressly requires two or more sureties.

Form of bond or undertaking; affidavit of sureties; approval by court or judge.

§ 812. A bond or undertaking, executed by a surety or sureties, as prescribed in this act, must, where two or more persons execute it, be joint and several in form; and, except as otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect, that he is a resident of, and a householder or a freeholder within, the State, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. A bond or undertaking given by a party, without a surety, must be

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accompanied by his affidavit, to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court, before which the proceeding is taken, or a judge thereof, or the judge, before whom the proceeding is taken. The approval must be indorsed upon the bond or undertaking.

When several sureties may justify, each in a smaller sum.

§ 813. But where the penalty of the bond, or twice the sum specified in the undertaking, is twenty thousand dollars, or upwards, the court or judge may, in its or his discretion, allow the sum, in which a surety is required to justify, to be made up by the justification of two or more sureties, each in a smaller sum. But, in that case, a surety cannot justify in a sum less than ten thousand dollars; and, where two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum, for more than one of them.

Bonds, etc., to the people or a public officer for the benefit of a suitor.

§ 814. Where a bond or undertaking has been given, as prescribed by law, in the course of an action or special proceeding, to the people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof; the party or other person, so interested, may maintain an action in his own name, for a breach of the condition of the bond, or of the terms of the undertaking; upon procuring an order, granting him leave so to do. The order may be made by the court, in which the action is or was pending; or by a superior city court, the marine court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or, in any other case, by the supreme court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.

Bonds, etc., not affected by change of parties.

§ 815. A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.

Id.; to be filed.

§ 816. A bond or undertaking, required to be given by this act, must be filed with the clerk of the court; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in this act.

ARTICLE SIXTH.

OTHER MATTERS.

SECTION 817. Consolidating causes in same court.
818. Id.; in different courts.
819. Id.; by plaintiff.
820. Interpleader by order in certain cases.
821. Dismissal of complaint for neglect to serve summons.
822. Id.; for neglect to proceed.
823. Feigned issues abolished, and order for trial substituted.
824. Summons and pleadings to be filed within ten days after service.
825. Papers in special proceedings; where to be filed.
826. Publication, if no newspaper in county.
827. Special references in certain cases.

Consolidating

§ 817. Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined,

are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action. causes in same court.

§ 818. Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court. Id.; in different courts.

§ 819. Where separate actions are commenced against two or more joint and several debtors, in the same court, and for the same cause of action, the plaintiff may, in any stage of the proceedings, consolidate them into one action. Id.; by plaintiff.

§ 820. A defendant, against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person, and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering possession of the property, or its value, to such person as the court directs. The court may, in its discretion, make such an order. Interpleader by order in certain cases.

§ 821. Where, in an action against two or more defendants, the plaintiff unreasonably neglects to serve the summons upon one or more of them, without whose presence a complete determination of the controversy cannot be had, the court may, in its discretion, upon the application of a defendant who has appeared in the action, dismiss the complaint as against him, and render judgment accordingly. Dismissal of complaint for neglect to serve summons.

§ 822. Where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more defendants against whom a separate judgment may be taken, the court may, in its discretion, upon the application of the defendant or defendants, or any of them, against whom he so neglects to proceed, dismiss the complaint as against the moving party or parties, and render judgment accordingly. Id.; for neglect to proceed.

§ 823. Feigned issues have been abolished. In a case, where neither party can, as of right, require a trial by jury of an issue of fact arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating, distinctly and plainly, the questions of fact to be tried. Such an order is the only authority necessary for the trial. Feigned issues abolished, and order for trial substituted.

§ 824. The summons, and each pleading in an action, must be filed with the clerk, by the party in whose behalf it is served, within ten days after the service thereof. If the party fails so to file it, the adverse party, on proof of the failure, is entitled, without notice, to an order from a judge, that it be filed within a time specified in the order, or be deemed abandoned. Summons and pleadings, to be filed within ten days after service.

§ 825. A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides. Papers in special proceedings, where to be filed.

§ 826. Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, *except* where special provision is otherwise made *by law*. Publication, where no newspaper in county.

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Special references in certain cases.

§ 827. Where a provision of this act authorizes the court to approve an undertaking, or the sureties thereto; or to make an examination or inquiry; or to appoint an appraiser, receiver or trustee; it may direct a reference, to one or more persons designated in the order, either to make the approval, examination, inquiry or appointment, or to report the facts to the court, for its action thereupon. And where, according to the practice of the court of chancery, on the thirty-first day of December, eighteen hundred and forty-six, a matter was referable to the clerk, or to a master in chancery, a court having authority to act thereupon, may direct a reference to one or more persons, designated in the order, with the powers which were possessed by the clerk, or the master in chancery, except where it is otherwise specially prescribed by law.

CHAPTER IX.

EVIDENCE.

TITLE I. — GENERAL REGULATIONS RESPECTING EVIDENCE, AND THE COMPETENCY AND MODE OF EXAMINATION OF A WITNESS.
TITLE II. — COMPELLING THE ATTENDANCE AND TESTIMONY OF WITNESS.
TITLE III. — DEPOSITIONS.
TITLE IV. — DOCUMENTARY EVIDENCE.
TITLE V. — MISCELLANEOUS PROVISIONS.

TITLE I.

General regulations respecting evidence, and the competency and mode of examination of a witness.

ARTICLE 1. Competency of a witness; evidence in particular cases.
2. Administration of an oath or affirmation.

ARTICLE FIRST.

COMPETENCY OF A WITNESS; EVIDENCE IN PARTICULAR CASES.

SECTION 828. No witness to be excluded by reason of interest, etc.
829. When party, etc., cannot be examined.
*830. Id.; husband or wife of party, etc.
831. When husband and wife not competent witnesses.
832. Conviction for crime, not to exclude witness; how conviction proved.
833. Clergymen, etc., not to disclose confessions.
834. Physicians not to disclose professional information.
835. Attorneys and counsellors not to disclose communications.
836. Application of the last three sections.
837. When witness not excused from testifying.
838. Evidence of party may be rebutted.
839. Admission by member of corporation.
840. Seal, presumptive evidence of consideration.
841. Presumption of death in certain cases.

No witness to be excluded by reason of interest, etc.

§ 828. Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended.

When party, etc., cannot be examined.

§ 829. Upon the trial of an action, or the hearing, upon the merits, of a special proceeding, a party, or a person interested in the event, or a person from, through, or under whom, such a party or interested person derives his interest or title, by assignment or otherwise; shall

*Stricken out.

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not be examined, as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person; or the committee of a lunatic; or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest, is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication.

Evidence of decedent, when it may be read.

§ 830. Where a party has died since the trial of an action, on the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him.

When husband and wife not competent witnesses. Id.; when competent.

§ 831. A husband or wife shall not be compelled, or without consent of the other if living, allowed to disclose a confidential communication, made by one to the other, during the marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

Conviction for crime not to exclude witness; how conviction proved.

§ 832. A person, who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question, relevant to that inquiry: and the party cross-examining him is not concluded, by his answer to such a question.

Clergymen, etc., not to disclose confessions.

§ 833. A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs.

Physicians not to disclose professional information.

§ 834. A person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity.

Attorneys and counsellors not to disclose communications.

§ 835. An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment.

Application of the last three sections.

§ 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient, or the client.

When witness not excused from testifying.

§ 837. A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor, or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness.

ART. 2.

§ 838. The testimony of a party, taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence. Evidence of party may be rebutted.

§ 839. The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation, unless it was made concerning and while engaged in a transaction, in which he was the authorized agent of the corporation. Admission by member of corporation.

§ 840. A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed. Seal, presumptive evidence of consideration.

§ 841. A person, upon whose life an estate in real property depends, who remains without the United States, or absents himself, in the State or elsewhere, for seven years together, is presumed to be dead, in an action or special proceeding, concerning the property, in which his death comes in question, unless it is affirmatively proved that he was alive within that time. Presumption of death in certain cases.

ARTICLE SECOND.

Administration of an Oath or Affirmation.

Section 842. Before whom oaths and affidavits may be taken.
843. Id.; in special cases.
844. Id.; without the State.
845. General mode of swearing.
846. When kissing the gospels dispensed with.
847. When affirmation to be made.
848. Other modes of swearing.
849. Swearing persons not Christians.
850. Court may examine witnesses.
851. Swearing falsely in any form, perjury.

§ 842. An oath or affidavit, required or authorized by law; except an oath to a juror or a witness upon a trial, an oath of office, and an oath required by law to be taken before a particular officer; may be taken before a judge, clerk, deputy-clerk, or special deputy-clerk, of a court, a notary public, mayor, justice of the peace, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds, within the district in which the officer is authorized to act; and when certified by the officer, to have been taken before him, may be used in any court, or before any officer or other person. Before whom oaths and affidavits may be taken.

§ 843. Where an officer, person, board, or committee, has been heretofore, or is hereafter authorized by law, to take or hear testimony, or to hear or receive an affidavit, or to take a deposition, in relation to a matter, concerning which he or it has a duty to perform, the officer or person, or a member of the board or committee, may administer an oath, for that purpose. Where an officer, person, board, or committee, to whom or to which application is made to do an act in an official capacity, requires information or proof, to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose. Id.; in special cases.

§ 844. An oath or affidavit required, or which may be received, in an action, special proceeding, or other matter, may be taken, without the State, except where it is otherwise specially prescribed by law, before an officer authorized by the laws of the State, to take and certify the acknowledgment and proof of deeds, to be recorded in the State; and, Id.; without the State.

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when certified by him to have been taken before him, and accompanied with the like certificates, as to his official character and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded within the State, may be used, as if taken and certified in this State, by an officer authorized by law to take and certify the same.

General mode of swearing.

§ 845. The usual mode of administering an oath, now practiced, by the person who swears laying his hand upon and kissing the gospels, must be observed, where an oath is administered, except as otherwise specially prescribed in this article.

When kissing the gospels dispensed with.

§ 846. The oath must be administered in the following form, to a person who so desires, the laying of the hand upon and kissing the gospels being omitted: "You do swear, in the presence of the everliving God". While so swearing, he may or may not hold up his hand, at his option.

When affirmation to be made.

§ 847. A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm".

Other modes of swearing.

§ 848. If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon and kissing the gospels, is in his opinion, more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.

Swearing persons not Christians.

§ 849. A person, believing in a religion other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed in section eight hundred and forty-five or section eight hundred and forty-six of this act.

Court may examine witness.

§ 850. The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

Swearing falsely in any form, perjury.

§ 851. A person swearing, affirming or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon and kissing the gospels.

TITLE II.

Compelling the attendance and testimony of a witness.

SECTION 852. Mode of serving subpœna issued out of a court.
853. Penalty for disobedience.
854. Subpœna to be issued by judge, etc.
855. Penalty for disobeying subpœna; warrant for witness.
856. When witness to be imprisoned.
857. Contents of warrant.
858. To whom directed; how executed.
859. Qualification of preceding sections.
860. Witness exempt from arrest.
861. When to be discharged from arrest.

862. By whom witness may be discharged
863. Arrest, when void; penalty.
864. Sheriff not to be liable, unless affidavit is made.
865. Application of foregoing provisions to judgments.
866. Records not to be removed by virtue of subpœna.
867. Id.; books of account.
868. Books, etc., of corporation, how produced.
869. When personal attendance not required by supœna duces tecum.

Mode of serving subpœna issued out of a court.

852. A subpœna, issued out of the court, to compel the attendance of tness, and, where the subpœna so requires, to compel him to bring him a book or paper, must be served as follows:

The original subpœna must be exhibited to the witness.

A copy of the subpœna, or a ticket containing its substance, must elivered to him.

The fees allowed by law, for travelling to, and returning from, lace where he is required to attend, and for one day's attendance, t be paid or tendered to him.

Penalty for disobedience.

853. A person so subpœnaed, who fails, without reasonable excuse, ey the subpœna, or a person who fails, without reasonable excuse, ey an order, duly served upon him, made by the court or a judge, action, before or after final judgment therein, requiring him to nd, and be examined, or so to attend, and bring with him a book paper, is liable, in addition to punishment for contempt, for the ages sustained by the party aggrieved in consequence of the failure, fifty dollars in addition thereto. Those sums may be recovered ne action, or in separate actions. If he is a party to the action in h he was subpœnaed, the court may, as an additional punishment, e out his pleading.

Subpœna to be issued by judge, etc.

854. Where a judge, or an arbitrator, referee, or other person, or a d or committee, has been heretofore, or is hereafter expressly orized by law, to hear, try, or determine a matter; or to do any r act in an official capacity, in relation to which proofs may be n, or the attendance of a person as a witness may be required; or quire a person to attend, either before him or it, or before another ge, or officer, or a person designated in a commission issued by a t of another State or country, to give testimony, or to have his osition taken, or to be examined; a subpœna may be issued, by under the hand of the judge, arbitrator, referee, or other person, or chairman, or a majority, of the board or committee, requiring the son to attend; and also, in a proper case, to bring with him a book paper. The subpœna must be served, as prescribed in section ht hundred and fifty-two of this act. This section does not apply matter arising, or an act to be done, in an action in a court of ord.

Penalty for disobeying subpœna; warrant for witness.

855. A person who is duly subpœnaed, as prescribed in the last tion, must obey the subpœna. If he fails so to do, without a reaable excuse, he is liable, in addition to any other punishment which y be lawfully inflicted therefor, for the damages sustained by the son aggrieved, in consequence of the failure, and fifty dollars in dition thereto, to be recovered as prescribed in section eight hund and fifty-three of this act. If he fails to attend, the person uing the subpœna if he is a judge of a court of record or not of ord, or if not, then any judge of such a court, upon proof by affivit of the failure to attend, must issue a warrant to the sheriff of e county, commanding him to apprehend the defaulting witness, d bring him before the officer, person, or body, before whom or hich his attendance was required.

TITLE 2.

When witness to be imprisoned.

§ 856. If the person subpœnaed and attending or brought as prescribed in the last section, before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper, which he was directed to bring by the terms of the subpœna, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpœna, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

Contents of warrant.

§ 857. A warrant of commitment, issued as prescribed in the last section, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

To whom directed; how executed.

§ 858. A warrant to apprehend or commit a person, issued as prescribed in this title, must be directed to the sheriff of the county where the person is, and must be executed by him, in the same manner, as a similar mandate issued, by a court of record, in an action.

Qualification of preceding sections.

§ 859. The foregoing sections of this title do not apply to a subpœna issued by a justice of the peace; or to a witness subpœnaed to attend a court held by a justice of the peace; or to a case where special provision is otherwise made by law, for compelling the attendance of a witness.

Witness exempt from arrest.

§ 860. A person duly and in good faith subpœnaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

When to be discharged from arrest.

§ 861. The court from which a subpœna, served in good faith, was issued, or by which an order was made, requiring a person to attend, for the purpose of being examined; or a judge thereof, upon proof, by affidavit, of the facts, must make an order, directing the discharge of a witness or other person, from an arrest made in violation of the last section.

By whom witness may be discharged.

§ 862. A justice of the supreme court, in any part of the State, or a county judge, or a judge of a superior city court, within his district, has the like authority as a judge of the court, to make an order for a discharge, in a case specified in the last section. Upon satisfactory proof, by affidavit, of the facts, he must also make an order, directing the discharge of a person arrested, in violation of section eight hundred and sixty of this act, where a subpœna, served in good faith upon the person arrested, was issued as prescribed in section eight hundred and fifty-four of this act.

Arrest, when void; penalty.

§ 863. An arrest made contrary to the foregoing provisions of this title, is absolutely void, and is a contempt of the court, if any, from which the subpœna was issued, or by which the witness was directed to attend. An action may be maintained, by the person arrested, against the officer or other person making such arrest, in which the plaintiff is entitled to recover treble damages. A similar action may also be maintained, in a like case, by the party in whose behalf the witness was subpœnaed, or the order procured, to recover the damages sustained by him, in consequence of the arrest.

Sheriff not to be liable, unless *affidavit is made.*

§ 864. But a sheriff, or other officer, or person, is not so liable, unless the person claiming an exemption from arrest, makes, if required by *the sheriff* or officer an affidavit to the effect that he was legally sub-

pœnaed or ordered to attend, and that he was not so subpœnaed or ordered by his own procurement, with the intent of avoiding arrest. In his affidavit he must specify the court or officer, the place of attendance, and the cause in which he was so subpœnaed or ordered. The affidavit may be taken before the officer arresting him, and exonerates the officer from liability for not making the arrest.

Application of foregoing provisions to judgments.

§ 865. The foregoing provisions of this title, relating to a person required, by an order of a court, to attend, apply, where such an attendance is required by the terms of a judgment.

Records not to be removed by virtue of subpœna.

§ 866. The record of a conveyance of real property, or any other record, or document, whereof a transcript duly certified may by law be read in evidence, shall not be removed, by virtue of a subpœna duces tecum, from the office in which it is kept; except temporarily, by the clerk having it in custody, to a term or sitting of the court of which he is clerk; or by the officer, having it in custody, to a term or sitting of a court, or a trial before a referee, held in the city or town where his office is situated. Where it is required at any other place, it may be removed, by order of the supreme court, a superior city court, or a county court, made in court, and entered in the minutes; specifying that the production of the original, instead of a transcript, is necessary.

Production, etc., of books of account.

§ 867. A person shall not be compelled to produce, upon a trial or hearing, a book of account, otherwise than by an order requiring him to produce it, or a subpœna duces tecum. Such a subpœna must be served at least five days before the day when he is required to attend. At any time after service of such a subpœna or order, the witness may obtain, upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpœna or the order for production, upon such terms as justice requires touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or, in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

Books, etc., of corporation, how produced.

§ 868. The production, upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in like manner as if it was in the hands, or under the control, of a natural person. For that purpose a subpœna duces tecum, or an order, made as prescribed in the last section, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is.

When personal attendance not required by subpœna duces tecum.

§ 869. In a case specified in the last section, or where a subpœna duces tecum, or an order, made as prescribed in section eight hundred and sixty-six or section eight hundred and sixty-seven of this act, requires a public officer to attend, and bring a book or paper under his control, the subpœna or order is deemed to be sufficiently obeyed, if the book or paper is produced by a subordinate officer or employee of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer of the corporation or public officer is required, a subpœna, without a duces tecum clause, must also be served upon him.

TITLE III.

Deposition.

ARTICLE 1. Depositions, taken and to be used within the State.
2. Depositions, taken without the State, for use within the State.
3. Depositions, taken within the State, for use without the State.

ARTICLE FIRST.

DEPOSITIONS, TAKEN AND TO BE USED WITHIN THE STATE.

SECTION 870. Deposition of a party, etc.
871. Deposition of a witness not a party.
872. Application; contents of affidavit.
873. Order for examination.
874. Subpœna.
875. Service of order, etc.
876. Deposition when and where to be taken.
*877. Application to vacate order.
*878. Proceedings upon such application; new order.
879. Deposition by consent.
880. Manner of taking and returning deposition.
881. When to be read in evidence.
882. Proof of witness's inability to attend.
883. Effect of deposition.
884. Original affidavits, evidence.
885. Deposition to be used on motion.
886. Where witness may be compelled to attend.

Deposition of a party, etc.

§ 870. The deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought in such a court, other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act, may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial, as prescribed in this article.

Deposition of a witness not a party.

§ 871. The deposition of a person not a party, whose testimony is material and necessary to a party to an action pending in a court of record, other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act, or to a person who expects to be a party to an action, about to be brought in such a court, by a person other than the person to be examined, may also be taken, as prescribed in this article.

Application; contents of affidavit.

§ 872. The person desiring to take a deposition, as prescribed in this article, may present to a judge of the court in which the action is pending; or, if it is pending in the supreme court, to a county judge; or, if an action is not pending, but is expected to be brought, to a judge of the supreme court, or of a superior city court, or to a county judge; an affidavit, setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared; and, if either of them has appeared by attorney, the name, and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action and the substance of the judgment demanded, and, if the application is made by the defendant before answer, or by either party after answer, the nature of the defence.

3. If no action is pending, the nature of the controversy which is expected to be the subject thereof.

*Stricken out.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application, or the prosecution or defence of such action, and, at the option of the applicant, the place where he is sojourning, or where he regularly transacts business.

5. If an action is pending, that the person to be examined is about to depart from the State; or that he is so sick or infirm, as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist, which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case, where the person to be examined is a party to the action.

6. If no action is pending, that the person expected to be the adverse party is of full age, and a resident of the State, or sojourning within the State; or that he has an office within the State, where he regularly transacts business in person, specifying the place, and, if it is in a city, the street and street number, or other designation of the particular locality; or, if two or more persons are expected to be adverse parties, that each is of full age, and so resident or sojourning, or has such an office; also the circumstances which render it necessary for the protection of the applicant's rights, that the witness's testimony should be perpetuated.

7. Any other fact, necessary to show that the case comes within one of the last two sections, or relevant to the questions specified in the next section.

Order for examination.

§ 873. The judge, to whom such an affidavit is presented, must grant an order for the examination, if an action is pending: if no action is pending, he must grant it, if there is reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony; otherwise he must dismiss the application. Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the judge, designate and limit the particular matters as to which he shall be examined. The order must require the party or person to be examined to appear before the judge, or, except where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be made within the State, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order.

Subpœna.

§ 874. If the party or person so served fails to obey the order, his attendance may be compelled, and he may be punished, in like manner, and the proceedings thereon are the same, as if he failed to obey a subpœna, issued from the court, in which the action is pending; or, if no action is pending, from the court of which the judge is a member.

Service of order, etc.

§ 875. A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action in the manner as a paper in the action; or, if a party has not appeared in the action, they must be served upon him, as directed by law. If no action is pending, they must be personally served upon each of the persons, named therein as expected adverse parties.

Deposition, etc.

Upon proof, by affidavit that service of a copy of the order and of the affidavit has been *duly made*, as directed in the order, the

TITLE 3.

and where to be taken. judge or the referee must proceed to take the deposition of the witness, at the time and place specified in the order. He may, from time to time, adjourn the examination to another day, and to another place, within the same county. Sections eight hundred and fifty-six, eight hundred and fifty-seven and eight hundred and fifty-eight of this act apply to the examination of a party or a person expected to be an adverse party, taken as prescribed in this article.

Deposition by consent. § 879. The parties to an action may stipulate, in writing, that the deposition of a competent witness, to be used therein, may be taken before a judge or referee, at a time and place specified in the stipulation, either orally, or upon interrogatories, to be agreed upon in like manner. The witness may be subpœnaed to attend the examination, as upon a trial; and the judge or referee may take his deposition, as if an order had been made by the court, directing it to be so taken.

Manner of taking and returning deposition. § 880. The examination of a party, or an expected party, is subject to the same rules as if he was examined upon the trial. The judge or referee, upon every other examination taken as prescribed in this article, must insert therein every answer or declaration of the person examined which either party requires to be inserted. The deposition, when completed, must be carefully read to and subscribed by the person examined; must be certified by the judge or referee taking it; and, within ten days thereafter, must be filed in the office of the clerk; or, if no action is pending, in the office of the clerk of the county in which it was taken; together with the stipulation or order, under which it was taken; the affidavit upon which the order was granted; and proof of the service of a copy of the order and of the affidavit. If, upon an examination before a referee, the person examined refuses to answer any question, the referee must report the fact to the court or judge, who must determine whether the question is relevant, and whether the witness is bound to answer it.

When to be read in evidence. § 881. The deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of damages, by writ of inquiry, or upon a reference, or otherwise, in the action specified in the original affidavit or stipulation; or any other action, thereafter brought, between the same parties, or between any parties claiming under them, or either of them; or, if no action is pending, an action thereafter brought, between the persons named in the original affidavit as expected parties, or between persons claiming under them or either of them.

Proof of witness's inability to attend. § 882. But such a deposition, except that of a party, taken at the instance of an adverse party, or a deposition taken in pursuance of a stipulation, as prescribed in this article, shall not be so read in evidence, until it has been satisfactorily proved, that the witness is dead, or is unable personally to attend, by reason of his insanity, sickness, or other infirmity; or that he has been and is absent from the State, so that his attendance could not, with reasonable diligence, be compelled by subpœna.

Effect of deposition. § 883. A deposition, so read in evidence, has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness; or to the relevancy or substantial competency of a question put to him, or of an answer given by him; may be made, as if the witness was then personally examined, and without being noted upon the deposition.

Original affidavits, evidence. § 884. The original affidavits, filed with such a deposition, or certified copies thereof, are presumptive evidence of the facts therein contained to show a compliance with the provisions of this article.

Deposition § 885. Where a party intends to make or oppose a motion in a court

of record, other than a court specified in subdivision sixteen, seventeen, eighteen or nineteen, of section two of this act, and it is necessary for him to have the affidavit or deposition of a person, not a party, to use upon the motion, the court, or a judge authorized to make an order, in the cause, may, in its or his discretion, make an order, appointing a referee to take the deposition of that person. The order must be founded upon proof, by affidavit, that the applicant intends to make the motion, or that notice of a motion has been given, which the applicant intends to oppose. The affidavit must specify the nature of the motion, and must show that the affidavit or deposition is necessary thereon, and that such person has refused to make an affidavit of the facts, which the applicant verily believes are within his knowledge. The order may be made upon or without notice The person to be examined may be subpœnaed, and compelled to attend, as upon the trial. The deposition, when taken, must be delivered to the attorney for the party who procured the order, unless the order provides for a different disposition thereof.

to be used on motion.

§ 886. Where a person to be examined, as prescribed in this article, is a resident of the State, he shall not be required to attend in any county, other than that in which he resides, or where he has an office for the regular transaction of business, in person. Where he is not a resident, he shall not be required to attend in any other county, than that wherein he is served with a subpœna, unless, for special reasons, stated in the affidavit, the order otherwise directs.

Where witness may be compelled to attend.

ARTICLE SECOND.

DEPOSITIONS, TAKEN WITHOUT THE STATE, FOR USE WITHIN THE STATE.

SECTION 887, 888. When commission to issue, etc.
889. How and upon what terms granted.
890. Order made by judge.
891. Interrogatories; how settled.
892. Id.; to be annexed; directions for return.
893. Commission to examine upon oral questions.
894. When open commission may issue, or depositions may be taken.
895. Last two sections not applicable to infants, etc., or foreign countries.
896. Notice of examination upon oral questions.
897. Open commission.
898. Order directing depositions to be taken.
899. Before whom depositions may * taken; notice of taking.
900. How depositions taken.
901. Commission or order to take depositions; how executed and returned.
902. Certificate of execution.
903. Certificate, a sufficient return.
904. Return by agent.
905. If agent is sick or dead.
906, 907. Filing disposition, etc., so returned.
908. Commission, etc., by consent.
909. Where return to be kept; parties may inspect it, etc.
910. When deposition may be suppressed.
911. Depositions, etc., evidence.
912. When interrogatories and deposition may be in a foreign language.
913. Letters rogatory.

§ 887. In a case specified in the next section, where it appears, by affidavit, on the application of either party, that the testimony of one

When commission to issue, etc.

* So in the original.

or more witnesses, not within the State, is material to the ap
a commission may be issued, to one or more competent persons
therein; authorizing them, or any one of them, to examine the
or witnesses named therein, under oath, upon the interrg
annexed to the commission; to take and certify the deposition
witness, and to return the same, and the commission, acco
the directions given in or with the commission. The appl
any other party to the action, may be thus examined.

The same.

§ 888. Such a commission may be issued, in either of the f
cases:

1. Where a party to an action, brought in a court of reco
default for want of an appearance or pleading, and the testi
required upon the assessment of damages, by a writ of inc
upon a reference; or otherwise, to enable the court to render th
final judgment.

2. Where final judgment has been rendered against the
party, in an action brought in a court of record; and the testi
required, in order to carry the judgment into effect.

3. Where an appeal from a final judgment, rendered in the
court, a superior city court, the marine court of the city of Ne
or a county court, or a motion for a new trial in either of those
is pending; and the testimony will be material and necessar
applicant in the prosecution or defence of the action, if a new
granted.

4. Where the application is made before the joinder of issu
action brought in either of the courts, specified in the last
sion; and there is reason to apprehend, that before issue is joi
an application for a commission can thereafter be made, the
will die, or become unable to give his testimony, or remove, so
testimony cannot be taken.

5. Where an issue of fact has been joined, in an action pend
court of record, and the testimony is material to the applicant
prosecution or defence thereof.

How and upon what terms granted.

§ 889. In a case specified in subdivision third of the last se
the appeal has been taken to another court, the application
made to the court in which the judgment was rendered; and a
directing the commission to be issued, may be granted or ref
the discretion of that court. In a case specified in either of th
subdivisions of that section, the application may be made to th
or a judge thereof, or, in the supreme court, to the county judg
county, where the action is triable; and it must be granted, u
isfactory proof of the facts authorizing it, unless the court or ju
reason to believe, that the application is not made in good
unless an order for an open commission, or for taking deposi
made as prescribed in this article. Notice of the application
given to the adverse party, unless he is in default for want o
pearance. Upon granting the order, the court or judge may,
case, impose such terms as justice requires.

Order made by judge.

§ 890. Where the order is made by a judge, out of court, it
entered in the office of the clerk. It shall be granted, only i
where the court would grant it, and upon the same terms; a
subject to the control of the court.

Interrogatories; how settled.

§ 891. Unless the interrogatories, to be annexed to the com

*So in the original.

are settled by consent of the parties, they must be settled, upon notice, by a judge of the court, or, in the supreme court, by the county judge of the county, where the action is triable, as prescribed in the general rules of practice.

Int.; to be annexed; directions for return.

§ 892. The interrogatories, when settled, must be annexed to the commission. Either party must be allowed to insert therein any question, pertinent to the issue, which he proposes. Unless the parties stipulate in writing, or the order granting the commission prescribes, how it shall be returned, the judge must indorse, upon the commission, the proper direction for that purpose. Unless the court or judge thinks proper to direct it to be returned by an agent, it must be returned through the post-office.

Commission to examine wholly or partly upon oral questions.

§ 893. Where an issue of fact, joined in an action, is pending in the supreme court, a superior city court, the marine court of the city of New York, or a county court, the parties may stipulate, in writing, or the court to which, or the judge to whom an application for a commission is made, may, in its or his discretion, direct, in the order, that a commission issue without written interrogatories, and that the depositions be taken upon oral questions; or that a commission issue to take the deposition of one or more witnesses, designated in the order, partly upon oral questions, and partly upon written interrogatories, or to take the deposition of one or more witnesses, designated in the order, upon oral questions, and one or more witnesses, designated in the order, upon written interrogatories.

When open commission may issue, or depositions may be taken.

§ 894. Where an issue of fact, joined in an action, is pending in either of the courts specified in the last section, the parties may stipulate, in writing, or the court, or a judge thereof, or, in the supreme court, the county judge of the county where the action is triable, may, in its or his discretion, upon the application of either party, and upon satisfactory proof, by affidavit, that one or more witnesses, not within the State, are material and necessary in the prosecution or defence of the action, make an order, upon such terms as it or he deems proper, directing that an open commission issue, or that depositions be taken, as prescribed in the following sections of this article.

Last two sections not applicable to infants, etc., or foreign countries.

§ 895. The last two sections are not applicable, where the adverse party is an infant, or the committee of a person judicially declared to be incapable of managing his affairs, by reason of lunacy, idiocy, or habitual drunkenness; or where the testimony is to be taken elsewhere than in the United States, or in Canada. Nor can the applicant be examined in his own behalf, as prescribed in those sections, except by consent of the parties.

Notice of examination upon oral questions.

§ 896. Where a commission is issued, to take testimony without written interrogatories, as prescribed in section eight hundred and ninety-three or section eight hundred and ninety-four of this act, notice of the time and place of the examination of a witness, by virtue thereof, naming the witness, must be served as prescribed in section eight hundred and ninety-nine of this act.

Open commission.

§ 897. An open commission must be directed to one or more persons, named therein, and must authorize them, or any one of them, to examine any witness who may be produced by either party, on or before a day specified therein, upon oral questions to be put to the witness, when he is produced; to take and certify the deposition of each witness so examined; and to return the same, and the commission, immediately after the expiration of the time limited for the production of witnesses, according to the directions, given in or with the commission.

TITLE 3.

Order directing depositions to be taken.

§ 898. An order directing that depositions be taken, must specify the time within which they must be taken, and the manner in which they must be returned. It may also contain such additional directions, not inconsistent with the next section, with respect to the time and manner of giving notice, as the court or judge deems proper. The order must be entered in the clerk's office; and a certified copy thereof must be annexed to each deposition, or set of depositions, returned as prescribed in the following sections of this article.

Before whom depositions may be taken; notice of taking.

§ 899. A deposition may be taken, pursuant to such an order, before a person mutually agreed upon by the parties, or a chancellor, or a judge of a court of record, or the mayor or other chief magistrate of a city, or a justice of the peace of the State or Territory, where the witness is; who is not counsel or attorney for either party, and would not be disqualified, by reason of affinity or consanguinity to a party, or interest in the event, from serving as a juror upon the trial of the action, within the State. Written notice of the time and place of taking a deposition, specifying the name of the witness, and the person before whom it will be taken, must be served by the party, at whose instance it is taken, upon the attorney for the adverse party. The time for serving such a notice must be, at least, five judicial days before the deposition is taken; and one judicial day, in addition, for each fifty miles, by the usual route of travel, between the residence of the attorney for the adverse party, and the place where the deposition is to be taken.

How depositions taken.

§ 900. Upon the examination of a witness, without written interrogatories, by virtue of a commission, or of an order to take depositions, the commissioner, or the person before whom the deposition is taken, must take down, or cause to be taken down, as prescribed in the next section, the substance of the witness's testimony; unless he is directed, in the commission or the order, or required by the person appearing for either party, to insert in the deposition any or all of the questions or answers, word for word. Unless the commission or order otherwise directs, the person, appearing for either party, may ask any question, which he deems proper, and the witness's answer must be taken accordingly, the objections thereto being reserved, without being specified at the time of examination. A copy of this section must be annexed to each commission to take testimony without written interrogatories, and to each certified copy of an order to take a deposition.

Commission or order to take depositions; how executed and returned.

§ 901. The person, to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order, as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, sub-

scribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner, or person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission, or in the order, to return the same through the post-office, he must immediately deposit the packet, so addressed, in the post-office, and pay the postage thereon.

6. If there is a direction, on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

Certificate of execution.

§ 902. The commissioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposition, a certificate, substantially in the following form, the blanks being properly filled up:

"State" (or "Territory") "of " }
"County" (or "parish") "of " } ss.

"I, , do certify that , the witness, personally appeared before me on the day of , at o'clock in the noon, at the , in the State" (or "Territory") "of , and after being sworn" (or "affirmed," as the case may be), "to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorsed the exhibits annexed thereto. And I further certify that I have subscribed my name to each half-sheet thereof, and to each exhibit. And I further certify that appeared in behalf of the , and that appeared in behalf of the ."

Certificate a sufficient return.

§ 903. The certificate, specified in the last section, is a sufficient return to a commission.

Return by agent.

§ 904. If the packet, specified in section nine hundred and one of this act, is delivered to an agent, he must deliver it to the clerk, to whom it is addressed, or to a judge of the court, either of whom must receive and open it, upon the agent making affidavit, that he received it from the hands of the commissioner, or the person who took the deposition, and that it has not been opened or altered, since he so received it.

If agent is sick or dead.

§ 905. If the agent is dead, or, from sickness or other casualty, is unable to deliver the packet personally, as prescribed in the last section, it must be received, by the clerk or judge, from the hands of any other person, upon the latter making an affidavit, that he received it from the agent; that the agent is dead, or otherwise unable to deliver it; that it has not been opened or altered since he received it and that

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he believes that it has not been opened or altered, since it came from the hands of the commissioner, or the person who took the deposition.

Filing deposition, etc., so returned.

§ 906. The clerk or judge, who receives and opens the packet, as prescribed in the last two sections, must indorse thereupon, and sign, a note of the time of the receipt and opening thereof, and immediately file it in the office of the clerk, together with the affidavit of the person, who delivered it to him.

The same.

§ 907. If the packet is transmitted through the post-office, the clerk, to whom it is addressed, must receive it from the post-office, open it, indorse thereupon, and sign, a like note of the time of the receipt and opening thereof, and immediately file it in his office.

Commission, etc., by consent.

§ 908. A commission may issue, or an order to take depositions may be made, by consent, in a case where either may be directed by the court or a judge, as prescribed in this article. On filing a stipulation to that effect, signed by the attorneys for the parties, the clerk must enter an order accordingly; and thereupon the attorney for the party, procuring the order, may insert in the commission, or indorse upon or annex to it, or the order, the necessary directions for the execution and return thereof, according to the stipulation.

Where return to be kept; parties may inspect it, etc.

§ 909. A commission, or copy of an order to take depositions, with the certificates, returns, depositions, and exhibits thereto annexed, must remain on file in the office of the clerk, unless otherwise provided by the stipulation of the parties, or unless the court, by a special order, directs them to be filed in the office of another clerk. They are always open to the inspection of the parties, either of whom is entitled to a copy of them, or of any part thereof, on payment of the fees allowed by law.

When deposition may be suppressed.

§ 910. Where it appears, by affidavit, that a deposition has been improperly or irregularly taken or returned; or that the personal attendance of the witness, upon the trial, could have been procured, with due diligence, by a subpœna; or that the attorney for either party has practiced any fraud, or unfair or overreaching conduct, to the prejudice of the adverse party, in the course of the proceedings; an order, for the suppression of the deposition, may be made by the court, upon the application of the party aggrieved, upon notice to the adverse party.

Deposition, etc., evidence.

§ 911. A deposition, taken and returned as prescribed in this article, or an exemplified copy thereof, if the original is filed in another county, may, unless it is suppressed as prescribed in the last section, be read in evidence by either party. It has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.

When interrogatories and deposition may be in a foreign language.

§ 912. Upon an application, made in the supreme court, a superior city court, the marine court of the city of New-York, or a county court, for a commission to be issued to a foreign country, if it satisfactorily appears, by affidavit, that the witness does not understand the English language, the order for the commission may, in the discretion of the court or judge, direct that written interrogatories annexed thereto, by way of direct and cross-examination, be framed in the English language, and also in a foreign language; that only the interrogatories framed in the foreign language be put to the witness; and that his answers be taken, and the certificates be made out, in the same lan-

guage. Where such an order is made, it must provide for the payment, by the applicant, to the adverse party, of a reasonable sum, fixed therein, for the expense of procuring the interrogatories, in his behalf, to be translated. The judge, who settles the interrogatories, must settle them in the foreign language, and in the English language; and, for that purpose, he may call in the assistance of one or more experts, whose compensation must be fixed by the judge, and paid by the applicant. When the deposition is read in evidence, it, and the interrogatories, must be interpreted into the English language, as if the witness, being unable to speak the English language, was personally present and testifying.

Letters rogatory.

§ 913. Letters rogatory may be issued from either of the courts specified in the last section, in its discretion, in a case where a commission may be issued, as prescribed in this article, upon satisfactory proof, by affidavit, that there is good reason to believe, that the ends of justice will be better promoted thereby, than by the issuing of a commission; notwithstanding that a commission can be executed, in the country to which they are sent. Letters rogatory can be issued only to examine one or more witnesses, upon written interrogatories, annexed thereto; which must be framed and settled, and the depositions must be returned, as prescribed in this article, with respect to the interrogatories annexed to a commission, and the depositions taken thereunder.

ARTICLE THIRD.

DEPOSITIONS, TAKEN WITHIN THE STATE, FOR USE WITHOUT THE STATE.

SECTION 914. In what cases deposition may be taken.
915. Subpœna to witness.
916. Contents of subpœna.
917. Subpœna, when no commission is issued.
918. Justice of the peace may subpœna witness.
919. Taking and return of deposition.
920. Penalty for not appearing.

In what cases deposition may be taken.

§ 914. A party to an action, suit, or special proceeding, civil or criminal, pending in a court without the State, either in the United States, or in a foreign country, may obtain, in the manner prescribed in this article, the testimony of a witness within the State, to be used in the action, suit, or special proceeding.

Subpœna to witness.

§ 915. Where a commission to take testimony, within the State, has been issued from the court, in which the action, suit, or special proceeding is pending; or where a notice has been given, or any other proceeding has been taken, for the purpose of taking the testimony, within the State, pursuant to the laws of the State or country, wherein the court is located, or pursuant to the laws of the United States if it is a court of the United States; the commission, notice, or other paper, authorizing the testimony to be taken, may be presented, in behalf of the party desiring to obtain it, to a justice of the supreme court, or a county judge, with proof, by affidavit, that the testimony of the witness is material to the party. The judge must thereupon issue a subpœna to the witness, commanding him to appear before the commissioner named in the commission; or before a commissioner, within the State, for the State, Territory, or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the

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commission, notice, or other paper, by his title of office; at a time and place specified in the subpœna, to testify in the action, suit, or special proceeding.

Contents of subpœna.

§ 916. The place, where the witness is commanded to attend, must be within the county in which he resides or sojourns; or, if it is in another county, not more than forty miles distant from his residence, or the place of his sojourn.

Subpœna, when no commission is issued.

§ 917. Where an action, suit, or special proceeding is pending in a court of another State, or of a Territory, or of the United States, and proof is made, by affidavit, to the satisfaction of a justice of the supreme court, or a county judge, as follows:

1. That a person, residing or sojourning within the state, is a material witness for either party.

2. That a commission, to take the testimony of the witness, has not been issued.

3. That, according to the course and practice of the court, in which the action, suit, or special proceeding is pending, the deposition of a witness, taken as the one applied for is required to be taken, is authorized, to be received in evidence on the trial or hearing.

The judge must issue a subpœna, commanding the witness to appear before him, at a specified time, and at a place within the county in which the witness resides or sojourns, to testify in the action, suit, or special proceeding.

Justice of the peace may subpœna witness.

§ 918. Where proof is made, by affidavit or otherwise, to the satisfaction of a justice of the peace:

1. That a civil action, suit, or special proceeding is pending in a court of another State, or of a Territory, or of the United States.

2. That a person, residing or sojourning in the town or city, in which the justice resides, is a material witness for either party.

3. That according to the practice of the court, in which the action, suit, or special proceeding is pending, the deposition of a witness, taken as the one applied for is required to be taken, is authorized, to be received in evidence on the trial or hearing.

The justice must issue a subpœna, commanding the witness to appear before him, at a specified time, and at a place within the town or city, in which the witness resides or sojourns, to testify in the action, suit or special proceeding.

Taking and return of deposition.

§ 919. The officer before whom a witness appears, in a case specified in this article, must take down his testimony in writing; and must certify and transmit it to the court, in which the action, suit or special proceeding is pending, as the practice of that court requires.

Penalty for not appearing.

§ 920. A person, who fails to appear, at the time and place specified in a subpœna, issued as prescribed in this article, and duly served upon him; or to testify; or to subscribe his deposition, when correctly taken down; is liable to the penalties, which would be incurred in a like case, if he was subpœnaed to attend the trial of an action in a justices court; and, for that purpose, the officer, before whom he is required to appear possesses all the powers of a justice of the peace upon a trial.

TITLE IV.

Documentary evidence.

ARTICLE 1. Documentary evidence, as a substitute for oral testimony.
2. Proof of a document executed or remaining within the State.
3. Proof of a document remaining in a court or public office of the United States, or executed or remaining without the State.

ARTICLE FIRST.

DOCUMENTARY EVIDENCE, AS A SUBSTITUTE FOR ORAL TESTIMONY

SECTION 921. Certain official certificates, evidence.
922. Certificate, etc., on file, evidence.
923. Notary's certificate, evidence.
924. Notary's protest and memorandum; when evidence.
925. Proof of presentment, etc., of foreign bills.
926. Affidavit of printer, etc., evidence.
927. Id.; of service of notice.
928. Marriage certificate, evidence.
929. Book of foreign corporation; when evidence.
930. When a copy thereof is evidence.
931. How copy to be verified.

Certain official certificates, evidence.

§ 921. Where the officer, to whom the legal custody of a paper belongs, certifies, under his hand and official seal, that he has made diligent examination, in his office, for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer personally testified to the same.

Certificate, etc., on file, evidence.

§ 922. Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit, touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit, so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated, by special provision of law.

Notary's certificate, evidence.

§ 923. The certificate of a notary public of the State, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or non-payment, of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto; is presumptive evidence of the facts certified, unless the party, against whom it is offered, has served upon the adverse party, with his pleading, or within ten days after joinder of an issue of fact, an original affidavit, to the effect, that he has not received notice of non-acceptance, or of non-payment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section.

Notary's protest and memorandum; when evidence.

§ 924. In case of the death or insanity of a notary public of the State, or of his absence or removal, so that his personal attendance, or his testimony, cannot be procured, in any mode prescribed by law, his original protest, under his hand and official seal, the genuineness thereof being first duly proved, is presumptive evidence of a demand acceptance, or of payment, therein stated; and a note or memoran-

dum, personally made or signed by him, at the foot of a protest, or in a regular register of official acts, kept by him, is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered, at the time, and in the manner, stated in the note or memorandum.

Proof of presentment, etc., of foreign bills.

§ 925. Proof of the presentment, for acceptance or payment, of a promissory note or bill of exchange, payable in another State, or in a Territory, or foreign country, or of a protest of the note or bill, for non-acceptance or non-payment, or of the service of notice thereof, on a party to the note or bill, may be made, in any manner authorized by the laws of the State, Territory, or county, where it was payable.

Affidavit of printer, etc., evidence.

§ 926. The affidavit of the printer or publisher of a newspaper, published within the State, or of his foreman or principal clerk, showing the publication of a notice or other advertisement, authorized or required, by a law of the State, to be published in that newspaper, annexed to a printed copy of the notice or other advertisement, may be read in evidence; and is presumptive evidence of the publication, and, also, of the matters stated therein, showing that the deponent is authorized to make the affidavit. But this section does not apply to a case, where the affidavit is required by law to be filed, unless it has been duly filed; or to a case, where the mode of proving a publication is otherwise specially prescribed by law.

Id.; of service of notice.

§ 927. Where it is necessary, upon the trial of an action, to prove the service of a notice, an affidavit, showing the service to have been made by the person making the affidavit, is presumptive evidence of the service, upon first proving that he is dead or insane, or that his personal attendance cannot be compelled, with due diligence.

Marriage certificate, evidence.

§ 928. An original certificate of a marriage, within the State, made by the minister or magistrate by whom it was solemnized; the original entry thereof, made, pursuant to law, in the office of the clerk of a city or a town within the State; or a copy of the certificate, or of the entry, duly certified, is presumptive evidence of the marriage.

Book of foreign corporation; when evidence.

§ 929. Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

When a copy thereof is evidence.

§ 930. If an original book is not produced at the trial, as prescribed in the last section, a copy thereof, or of an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence proposed to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

How copy to be verified.

§ 931. The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book, or the entry therein. The witness must testify that the copy produced is correct; that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation; or that it w then acknowledged to him to be such, by an officer or receiver of t corporation, or a person having the custody thereof, naming the per who made the acknowledgment; and he must specify where, and whose custody, the original was then kept.

ARTICLE SECOND.

PROOF OF A DOCUMENT, EXECUTED OR REMAINING WITHIN THE STATE.

SECTION 932. Statutes, etc.; how proved.
933. Copies of records and papers in certain offices, presumptive evidence.
934. Id.; of papers filed with town clerk.
935. Conveyance, when acknowledged, or record, or transcript of record, evidence.
936. Such evidence may be rebutted.
937. What instruments may be acknowledged.
938. Justice's docket and transcript evidence before him.
939. Transcript from justice's docket, evidence generally.
940. Other proof of proceedings before justice.
941. Charter, ordinances, etc., of cities and villages.

Statutes, etc.; how proved.

§ 932. A statute or joint resolution, passed by the Legislature of the State, may be read in evidence from a newspaper, designated as prescribed by law, to publish the same, until six months after the close of the session at which it was passed; and at any time, from a volume printed under the direction of the Secretary of State.

Copies of records and papers in certain offices, presumptive evidence.

§ 933. A copy of a paper filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law, an official seal; or with the clerk of a court of the State, or with the clerk or secretary of either house of the legislature, or of any other public body or public board created by authority of a law of the State, and having pursuant to law, a seal; or a transcript from a record kept pursuant to law in such a public office or by such a clerk or secretary, is evidence, as if the original was produced. But to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original, or his deputy or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary or clerk of the public body or board, appointed pursuant to law, under his hand, and except where it is certified by the clerk or secretary of either house of the legislature, under the official seal of the body or board.

Id.; of papers filed with town clerk.

§ 934. A copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original.

Conveyance, when acknowledged, or record, or transcript of record, evidence.

§ 935. A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance.

Such evidence may be rebutted.

§ 936. The certificate of the acknowledgment, or of the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof.

What instruments

§ 937. Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the

TITLE 4.

may be acknowledged.

manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property.

Justice's docket and transcript evidence before him.

§ 938. The docket-book of a justice of the peace, within the State, or a transcript thereof, certified by him, is evidence before him, of any matter required by law to be entered by him therein.

Transcript from justice's docket, evidence generally.

§ 939. A transcript from the docket-book of a justice of the peace within the State, subscribed by him, and authenticated, by a certificate of the clerk of the county in which the justice resides, under his hand and official seal, to the effect, that the person, subscribing the transcript, was, at the date of the judgment therein mentioned, a justice of the peace of that county; and that the clerk is acquainted with his handwriting, and verily believes that the signature to the transcript is genuine; is evidence of any matter stated in the transcript, which is required by law to * entered by the justice in his docket-book.

Other proof of proceedings before justice.

§ 940. The proceedings in an action brought, or a special proceeding instituted, before a justice of the peace, within the State, may also be proved by the oath of the justice. In case of his death or absence, they may be proved by the original minutes of the proceedings kept by him, pursuant to law, accompanied with proof of his handwriting; or by a copy of the minutes, sworn to, by a competent witness, as having been compared with the original entries, with proof that those entries were in the handwriting of the justice.

Ordinances, etc., of cities, villages, etc.

§ 941. An act, ordinance, resolution, by-law, rule, or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a board of supervisors, within the State, may be read in evidence, either from a copy thereof, certified by the city clerk, village clerk, clerk of the common council, or clerk of the board of supervisors; or from a volume, printed by authority of the common council of the city, or the board of trustees of the village, or the board of supervisors.

ARTICLE THIRD.

PROOF OF A DOCUMENT, REMAINING IN A COURT OR PUBLIC OFFICE OF THE UNITED STATES, OR EXECUTED OR REMAINING WITHOUT THE STATE.

SECTION 942. Printed copies of laws of another State, etc.
943. Copies of records of United States courts.
944. Id.; of documents on file in departments of United States.
945. Record of bill of sale, etc., of vessels.
946. Conveyance of land without the State.
947. Exemplification of record of conveyance of land without the State.
948. Transcript of docket, etc., of justice of adjoining State.
949. Id.; how authenticated.
950. Other proof.
951. Proof may be rebutted.
952. Copies of records of courts of foreign countries; how authenticated.
953. Other proof.
954. This article does not declare effect of record, etc.
† 955. Judgments in Canada, presumptive evidence only.
956. Documents from foreign countries; how authenticated.

Printed copies of laws of another State, etc.

§ 942. A printed copy of a statute, or other written law, of another State, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be com-

* So in the original. † Stricken out.

monly admitted, as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another State, or of a territory, or of a foreign country, may be proved, as a fact, by oral evidence. The books of reports of cases, adjudged in the courts thereof, must also be admitted, as presumptive evidence of the unwritten or common law thereof.

Copies of records of United States courts.

§ 943. A copy of the record, or any other proceeding, of a court of the United States, is evidence, when certified by the clerk or officer, in whose custody it is required by law to be.

Id.; of documents on file in departments of United States.

§ 944. A copy of a record or other paper, remaining in a department of the government of the United States, is evidence, when certified by the head, or acting chief officer, for the time being, of that department; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States, relating to certifying the same. The record of the observations of the weather, taken under the direction of the signal service of the United States, when certified by the officer in charge thereof at the place where they were taken and are kept, is presumptive evidence of the matters of fact stated therein.

Record of bill of sale, etc., of vessels.

§ 945. The record of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, belonging to a port or place, within the United States, recorded in the office of the collector of customs, where the vessel is registered or enrolled, which was acknowledged or proved, before it was recorded, in like manner as a deed to be recorded within the State; or a transcript of such a record, duly certified by the collector; is evidence, with the like effect as the original.

Conveyance of land without the State.

§ 946. A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as if it related to real property situated within the State. A conveyance of real property, situated within another State, or a Territory of the United States, which has been duly authenticated, according to the laws of that State or Territory, so as to be read in evidence in the courts thereof, is evidence in like manner.

Exemplification of record of conveyance of land without the State.

§ 947. An exemplification of the record of a conveyance of real property situated without the State, and within the United States, which has been recorded in the State or Territory, where the real property is situated, pursuant to the laws thereof, when certified under the hand and seal of the officer, having the custody of the record, is, if the original cannot be produced, presumptive evidence of the conveyance, and of the due execution thereof.

Transcript of docket, etc., of justice of adjoining State.

§ 948. A transcript from the docket-book of a justice of the peace, within an adjoining State, of a judgment rendered by him; a transcript of his minutes of the proceedings in the cause, previous to the judgment; or of an execution issued thereon; or of the return of an execution; when subscribed by the justice, and authenticated as prescribed in the next section, is presumptive evidence of his jurisdiction in the cause, and of the matters shown by the transcript.

Id.; how authenticated.

§ 949. Such a transcript must be authenticated by a certificate of the justice, annexed thereto, to the effect, that it is in all respects correct, and that he had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county, in which the justice resided at the time of rendering the judgment, under his hand and the seal of the court of common pleas, or other county court of the county,

to the effect that the person, subscribing the certificate attached to the transcript, was, at the date of the judgment, a justice of the peace of that county; and that the signature thereto is in his own handwriting.

Other proof.

§ 950. The judgment and other proceedings, and the justice's authority to render the judgment, may also be proved, by the production of the docket, or of a copy of the judgment or other proceedings; and the oral testimony of the justice, to the truth and correctness thereof, and to his authority to render the judgment.

Proof may be rebutted.

§ 951. The last three sections do not prevent the introduction of evidence, to controvert any of the proof, in relation to the validity of a judgment therein specified.

Copies of records of courts of foreign countries; how authenticated.

§ 952. A copy of a record, or other judicial proceeding, of a court of a foreign country, is evidence, when authenticated as follows:

1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office.

2. By a certificate of the chief-judge or presiding magistrate of the court to the effect, that the person, so attesting the record, is the clerk of the court; or that he is the officer, in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine.

3. By the certificate, under the great or principal seal of the government, under whose authority the court is held, of the Secretary of State, or other officer having the custody of that seal, to the effect, that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief-judge or presiding magistrate, to the certificate specified in the last subdivision, is genuine.

Other proof.

§ 953. A copy of a record, or other judicial proceeding, of a court of a foreign country, attested by the seal of the court, in which it remains, must also be admitted in evidence, upon due proof of the following facts:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of the original.

2. That the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally having charge of it.

3. That the attestation is genuine.

This article does not declare effect of record, etc.

§ 954. Nothing in this article is to be construed, as declaring the effect of a record or other judicial proceeding of a foreign country, authenticated so as to be evidence.

Documents from foreign countries; how authenticated.

§ 956. A copy of a patent, record, or other document, remaining of record, in a public office of a foreign country certified, according to the form in use in that country, is evidence when authenticated as follows:

1. By the certificate under the hand and official seal of a commissioner, appointed by the Governor, to take the proof or acknowledgment of deeds in that country, to the effect, that the patent record or document is of record in the public office, and that the copy thereof is correct, and certified in due form.

2. By a certificate under the hand and official seal of the Secretary of State annexed to that of the commissioner, to the same effect as prescribed by law for the authentication of the certificate of such a commissioner upon a conveyance to be recorded within the State. The certificate of the commissioner, thus authenticated, is presumptive evidence that the copy of the patent, record or document, is certified according to the form in use in the foreign country.

TITLE V.

Miscellaneous provisions.

SECTION 957. Form of certificate to copies, etc.
958. Certificate must be sealed.
959. Qualification of last section.
960. Public or corporate seal may be stamped; but private seal not.
961. Surrogates, clerks, etc., to search files, and to certify, etc.
962. Saving clause.

Form of certificate to copies, etc.

§ 957. Where a transcript, exemplification, or certified copy of a record or other paper, is declared by law to be evidence, and special provision is not made for the form of the certificate, in the particular case, the person, authorized to certify, must state, in his certificate, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.

Certificate must be sealed.

§ 958. If the officer, or the court, body, or board, in whose custody an original paper, specified in the last section, is required to be, by the laws of the State, or of another State, or of the United States, or of a Territory thereof, or of a foreign country, has, pursuant to those laws, an official seal, the certificate must be attested by that seal. If the certificate is made by the clerk of a county, within the State, it must be attested by the seal of the county.

Qualification of last section.

§ 959. The last section does not require the seal of a court to be affixed to a certified copy of an order, or of a paper filed therein, or entry made, where the copy is used in the same court, or before an officer thereof; or, in the supreme court, where it is used in a circuit court, or a court of oyer and terminer.

Public or corporate seal may be stamped.

§ 960. Where a seal of a public officer, or of a corporation, is authorized or required by law, it may be impressed directly on the paper.

Surrogates, clerks, etc., to search files, and to certify, etc.

§ 961. A surrogate, county clerk, register, clerk of a court, or other person, having the custody of the records or other papers in a public office, within the State, must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in his office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found. If he refuses, or unreasonably neglects or delays, to make such a search, or to furnish such a transcript or certificate, or makes a false certificate, he is guilty of a misdemeanor.

Saving clause.

§ 962. Nothing in title fourth of this chapter prevents the proof of a fact, act, record, proceeding, document, or other paper or writing, according to the rules of the common law, or by any other competent proof.

TITLE I.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel.

What issues are triable by the court.

§ 969. An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed.

Order for trial by jury, of specific questions of fact, when of right.

§ 970. Where a party is entitled, by the Constitution, or by express provision of law, to a trial, by a jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order, directing all the questions, arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which, by a jury, the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions, arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury, upon each question so stated, is conclusive in the action, unless the verdict is set aside, or a new trial is granted.

Id.; when discretionary.

§ 971. In an action, where a party is not entitled, as of right, to a trial by a jury, the court may, in its discretion, upon the application of either party, or without application, direct that one or more questions of fact, arising upon the issues, be tried by a jury, and may cause those questions to be distinctly and plainly stated for trial accordingly.

Trial of the remainder of the issues.

§ 972. If the questions, directed to be tried by a jury, as prescribed in the last two sections, do not embrace all the issues of fact in the action, the remaining issues of fact must be tried by the court, or by a referee.

Counterclaim to be deemed an action, within the foregoing sections.

§ 974. Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

Immaterial issues need not be tried.

§ 975. An issue, the disposition of which is not necessary to enable the court to render the appropriate judgment, is not required to be tried.

What issues to be tried before one judge; regulation of trial in the supreme court.

§ 976. An issue of law, or an issue of fact, triable by a jury or by the court, must be tried at a term held by one judge only, except as otherwise prescribed in section two hundred ninety-seven of this act. In the supreme court, an issue of fact, triable by a jury, must be tried in the circuit court; and an issue of fact, triable by the court, or an issue of law, may be tried in the circuit court, or at a special term of the supreme court, as prescribed in the general rules of practice.

Notice of trial and note of issue. Calendar to be prepared.

§ 977. At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action; the names of the attorneys; the time when the last pleading was served; the nature of the issue, whether of fact or of law; and, if an issue of fact, whether it is triable by a jury, or by the court, without a jury. The note of issue must be filed, at least twelve days before the commencement of the term. The clerk must thereupon enter the cause upon the calendar according to the date of the issue. The clerk must prepare the calen-

dar and have the necessary copies ready for distribution at least five days before the commencement of the term. In the city and county of New York, where a party has served a notice of trial, and filed a note of issue, for a term, at which the cause is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue for a succeeding term; and the action must remain on the calendar until it is disposed of.

Issues how arranged. Order of disposition at a jury term.

§ 978. The issues on the calendar must be arranged by the clerk, in the following order:

1. Issues of fact.
2. Issues of law.

Where a jury is in attendance, the issues must be disposed of in the same order; unless, for the convenience of parties, or the dispatch of business, the judge holding the term otherwise directs.

Id.; when a jury does not attend.

§ 979. Where a jury is not in attendance, issues of law have a preference over issues of fact; unless the judge holding the term otherwise directs.

Either party may bring issue to trial.

§ 980. Either party, who has served the notice, may bring the issue to trial; and, in the absence of the adverse party, unless the judge holding the term, for good cause, otherwise directs, may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision, or judgment, as the case requires. An inquest, for want of an affidavit of merits, cannot be taken where the answer is verified.

What papers to be furnished on trial, and by whom.

§ 981. Where the issue is brought to trial by the plaintiff, he must furnish the court with copies of the summons and pleadings, and of the offer, if any has been made. Where the issue is brought to trial by the defendant, and the plaintiff does not furnish those papers, they must be furnished by the defendant.

ARTICLE SECOND.

THE PLACE OF TRIAL.

SECTION 982. Certain actions to be tried, where the subject thereof is situated.
983. Other actions, where the cause thereof arose.
984. Other actions, according to the residence of the parties.
985. Place of trial, if proper county not designated.
986. Defendant may demand change; proceedings thereupon.
987. When court may change the place of trial.
988. Effect of changing the place of trial.
989. Effect of order changing place of trial.
990. Issues of law, where triable.
991. This article applicable only to the supreme court.

Certain actions to be tried, where the subject thereof is situated.

§ 982. Each of the following actions must be tried in the county, in which the subject of the action, or some part thereof, is situated: an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property, or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment, directing a conveyance of real

TITLE 1.

property; and every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling, or otherwise affecting, an estate, right, title, lien, or other interest, in real property, or a chattel real. But where all the real property, to which the action relates, is situated without the State, the action must be tried, as prescribed in section nine hundred and eighty-four of this act.

Other actions, where the cause thereof arose.

§ 983. An action, for either of the following causes, must be tried in the county, where the cause of action, or some part thereof, arose:

1. To recover a penalty or forfeiture, imposed by statute; except that, where the offence, for which it is imposed, was committed on a lake, river, or other stream of water, situated in two or more counties, the action may be tried in any county, bordering on the lake, river, or stream, and opposite to the place where the offence was committed.

2. Against a public officer, or a person specially appointed to execute his duties, for an act done, in virtue of his office, or for an omission to perform a duty, incident to his office; or against a person, who, by the command or in the aid of a public officer, has done anything touching his duties.

3. To recover a chattel distrained, or damages for distraining a chattel.

Other actions, according to the residence of the parties.

§ 984. An action, not specified in the last two sections, must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county, which the plaintiff designates, for that purpose, in the title of the complaint.

Place of trial, if proper county not designated.

§ 985. If the county, designated in the complaint, as the place of trial, is not the proper county, the action may notwithstanding be tried therein; unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff, or the order of the court.

Defendant may demand change; proceedings thereupon.

§ 986. Where the defendant demands that the action be tried in the proper county, his attorney must serve upon the plaintiff's attorney, with the answer, or before service of the answer, a written demand accordingly. The demand must specify the county, where the defendant requires the action to be tried. If the plaintiff's attorney does not serve his written consent to the change, as proposed by the defendant, within five days after service of the demand, the defendant's attorney may, within ten days thereafter, serve notice of a motion to change the place of trial.

When court may change the place of trial.

§ 987. The court may, by order, change the place of trial, in either of the following cases:

1. Where the county, designated for that purpose in the complaint, is not the proper county.

2. Where there is reason to believe, that an impartial trial cannot be had in the proper county.

3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change.

Effect of changing the place of trial.

§ 988. Where the place of trial is changed to another county, the subsequent proceedings shall be had in the county to which the change is made, the same as if it had been designated in the complaint, as the place of trial; except as otherwise directed by the court, or provided by the written consent of the parties, filed with the clerk. And the clerk of the county, from which it is changed, must forthwith deliver to the clerk of the county, to which it is changed, all papers filed in the action, and certified copies of all minutes and entries relating

to, which must be filed, entered, or recorded, as the case requires, e office of the last named clerk.

89. An order to change the place of trial takes effect, upon the thereof, in the office of the clerk of the county, from which the of trial is changed. But for the purposes of the place of hearing, ion to set it aside, or an appeal therefrom, the place of trial is ed unchanged. Effect of order changing place of trial.

90. An issue of law may be tried in any county, within the ial district embracing the county wherein the action is triable; fter the trial, the decision and all other papers relating to the must be filed, and the judgment rendered must be entered, in ast named county. Issues of law, where triable.

91. This article is applicable to an action in the supreme court only. This article applicable only to the supreme court.

ARTICLE THIRD.

EXCEPTIONS, CASE, AND MOTION FOR A NEW TRIAL.

SEC. 992. What rulings may be excepted to.
993. Refusal of court or referee, to find upon facts may be excepted to.
994. When and how exceptions may be taken, after close of trial by court or referee.
995. Id.; during the trial, or upon the trial by jury.
996. Ruling excepted to; how reviewed.
997. Case, when necessary; how made and settled.
998. When appeal, etc., may be heard without a case.
999. Motion for new trial upon judge's minutes; appeal from order thereupon.
1000. When and how exceptions, taken upon a jury trial, heard at general term.
1001. Motion for new trial at general term, when trial was by court or referee.
1002. When motion for new trial to be made at special term. Restrictions thereupon.
1003. Application of this article to trials of specific questions by jury; special provisions applicable thereto.
1004. Motion for new hearing, after trial of specific questions by a referee.
1005. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.
1006. When exception not to prejudice motion for new trial.
1007. Notes of stenographer may be treated as minutes of the judge.

§ 992. An exception may be taken to the ruling of the court or of a referee, upon a question of law, arising upon the trial of an issue of fact. Except as prescribed in section one thousand one hundred and eighty of this act, an exception cannot be taken to a ruling, upon a question of fact. For the purposes of this article, a trial by a jury is regarded as continuing, until the verdict is rendered. What rulings may be excepted to.

TITLE I.

Refusal of court or referee, to find upon facts may be excepted to.

§ 993. Upon the trial of an issue of fact by a referee, or by the court, without a jury, a refusal to make any finding whatever, upon a question of fact, where a request to find thereupon is seasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, within the meaning of the last section.

When and how exceptions may be taken, after close of trial by court or referee.

§ 994. Where an issue of fact is tried by a referee, or by the court, without a jury, an exception to a ruling, upon a question of law, made after the cause is finally submitted must be taken, by filing a notice of the exception in the clerk's office, and serving a copy thereof upon the attorney for the adverse party. The exception may be so taken, at any time before the expiration of ten days after service, upon the attorney for the exceptant, of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon. If the notice of exception is filed before the entry of final judgment, it must be inserted in the judgment-roll; if afterwards, it must be annexed to the judgment-roll. In either case, it constitutes a part of the papers, upon which an appeal from the judgment must be heard.

Id.; during the trial, or upon trial by jury.

§ 995. In any other case, an exception must be taken, at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case, it must be taken before the jury have rendered their verdict. It must, at the time when it is taken, be reduced to writing by the exceptant, or entered in the minutes.

Ruling excepted to; how reviewed.

§ 996. A ruling, to which an exception is taken, as prescribed in the last four sections, can be reviewed only upon an appeal from the judgment, rendered after the trial; except in a case, where it is expressly prescribed by law, that a motion for a new trial may be made thereupon.

Case, when necessary; how made and settled.

§ 997. Where a party intends to appeal from a judgment, rendered after the trial of an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed, by the judge or the referee, by or before whom the action was tried, as prescribed in the general rules of practice; or, in case of the death or disability of the judge or referee, in such manner as the court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case. If it afterwards becomes necessary to separate the exceptions, the separation may be made, and the exceptions may be stated, with so much of the evidence and other proceedings, as is material to the questions raised by them, in a case, prepared and settled, as directed in the general rules of practice; or, in the absence of directions therein, by the court, upon motion. It is not necessary to state, in a case, that a finding upon the facts, or a ruling upon the law, was made, where the finding or ruling appears in a referee's report, or in the decision of the court, upon a trial by the court, without a jury.

When appeal, etc., may be heard without a case.

§ 998. It is not necessary to make a case, for the purpose of moving for a new trial, upon the minutes of the judge, who presided at a trial by a jury; or upon an allegation of irregularity, or surprise; or when a party intends to appeal from a judgment entered upon a referee report, or a decision of the court upon a trial, without a jury, and rely only upon exceptions, taken as prescribed in section nine hundred and ninety-four of this act.

Motion for new trial

§ 999. The judge, presiding at a trial by a jury, may, in his discretion, entertain a motion, made upon his minutes, at the same term,

set aside the verdict and grant a new trial, upon exceptions; or because the verdict is for excessive or insufficient damages; or otherwise contrary to the evidence, or contrary to law. If an appeal is taken from the order, made upon the motion, it must be heard, upon a case, prepared and settled in the usual manner.

Judge's minutes appeal from order thereupon.

§ 1000. Upon the application of a party who has taken one or more exceptions, the judge, presiding at a trial by a jury, may, in his discretion, at any time during the same term, direct an order to be entered, that the exceptions so taken be heard, in the first instance, at the general term; and that judgment upon the verdict be suspended, in the mean time. At any time before the hearing of the exceptions, the order may be revoked or modified, upon notice, in court or out of court, by the judge who made it; or it may be set aside for irregularity, by the court, at any term thereof. Unless it is so revoked or set aside, the exceptions must be heard upon a motion for a new trial, which must be decided by the general term. The motion is deemed to have been made, when the order was granted; and either party may notice it for hearing at the general term, upon the exceptions.

When and how exceptions, taken upon a jury trial, heard at general term.

Amended 1882

§ 1001. Where the decision or report, rendered upon the trial of an issue of fact by the court, without a jury, or by a referee, directs an interlocutory judgment to be entered; and further proceedings must be taken, before the court, or a judge thereof, or a referee, before a final judgment can be entered; a motion for a new trial, upon one or more exceptions, may be made at the general term, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. The time within which the party must except, for that purpose, to a ruling of law, made, upon such a trial, by the judge or the referee, after the close of the testimony, is ten days after service of a copy of the decision or report, and notice of the entry of the interlocutory judgment thereupon.

Motion for new trial at general term, when trial was by court or referee.

§ 1002. In a case, not specified in the last three sections, a motion for a new trial must, in the first instance, be heard and decided at the special term. But where it is founded upon an allegation of error, in a finding of fact, or ruling upon the law, made by the judge upon the trial, it cannot be heard at a special term, held by another judge; unless the judge, who presided at the trial, is dead, or his term of office has expired, or he specially directs the motion to be heard before another judge. And a trial by a referee cannot be reviewed, by a motion for a new trial, founded upon such an allegation, except in a case specified in the last section.

When motion for new trial to be made at special term. Restrictions thereupon.

§ 1003. The provisions of this article, relating to the proceedings to review a trial by a jury, are applicable to the trial, by a jury, of one or more specific questions of fact, arising upon the issues, in an action triable by the court. But, except in a case specified in section nine hundred seventy of this act, a new trial may be granted, as to some of the questions so tried, and refused as to the others; and an error, in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disregarded; if that court is of opinion, that substantial justice does not require that a new trial should be granted. Where the judge, who presided at the trial, neither entertains a motion for a new trial, nor directs exceptions, taken at the trial, to be heard at the general term, a motion for a new trial can be made only at the term, where the motion for final judgment is made, or the remaining issues of fact are tried, as the case requires.

Application of this article to trials of specific questions by jury; special provisions applicable thereto.

TITLE 2.

Motion for new hearing, after trial of specific questions by a referee.

§ 1004. In an action triable by the court, where a reference has been made, to report upon one or more specific questions of fact, involved in the issue, a motion for a new hearing may be made at a special term, at any time before the hearing of a motion for final judgment, or the trial of the remaining issues of fact. The motion must be made upon affidavits, unless the court, or a judge thereof, directs a case to be prepared and settled.

Final judgment, etc., not stayed by motion for a new trial. Motion may be heard afterwards.

§ 1005. The entry of final judgment, and the subsequent proceedings to collect or otherwise enforce it, are not stayed by an exception, the preparation or settlement of a case, or a motion for a new trial, unless an order for such a stay is procured and served; and the entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial. Where a new trial is granted, the court may direct and enforce restitution, as where a judgment is reversed upon appeal.

When exception not to prejudice motion for new trial.

§ 1006. The taking of an exception, upon a trial by a jury, or the statement thereof in a case, as prescribed in this article, does not prejudice a motion for a new trial, on the ground that the verdict was contrary to evidence; but such a motion may be made, before or after the hearing of the exception; or, in the discretion of the court before which the exception is heard, at the time of the hearing.

Notes of stenographer may be treated as minutes of the judge.

§ 1007. The notes of an official stenographer or assistant-stenographer, taken at a trial, when written out at length, may be treated, in the discretion of the judge, as the minutes of the judge upon the trial, for the purposes of this article.

TITLE II.

Trials without a jury.

SECTION 1008. If trial by jury waived, action must be tried by the court.
1009. Trial by jury; how waived.
1010. Decision upon trial by the court, when to be filed; consequence of failure.
1011. Reference by consent; when and how made.
1012. Qualification of the last section.
1013. Compulsory reference for the trial of issues; in what cases it may be made.
1014. Proceedings where the reference is for trial of part of the issues.
1015. Compulsory reference upon questions incidentally arising.
1016. Referee to be sworn.
1017. Witnesses may be subpœnaed.
1018. General powers of a referee, upon a trial.
1019. Referee's report; when to be made, consequence of failure.
1020. Double or other increased damages.
1021. Decision of court or report of referee, upon trial of demurrer.
1022. Id.; upon trial of the whole issue of fact.
1023. Parties may require court or referee to determine particular questions.
1024. Qualifications of a referee.
1025. Several referees may be appointed.
1026. Proceedings regulated where there are several referees.

If trial by jury waived, &c.

§ 1008. In an action triable by a jury, if the parties waive the trial, by a jury, of the issue of fact, the action must be tried by the court,

without a jury; unless a reference is directed, in a case prescribed by law. But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section.

tion must be tried by the court.

§ 1009. A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:

Trial by jury; how waived.

1. By failing to appear at the trial.

2. By filing with the clerk a written waiver, signed by the attorney for the party.

3. By an oral consent in open court, entered in the minutes.

4. By moving the trial of the action, without a jury; or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial.

§ 1010. Upon a trial, by the court, of an issue of fact or of law, its decision, in writing, must be filed, in the clerk's office, within twenty days after the final adjournment of the term, where the issue was tried. If it is not so filed, either party may move, at a special term, for a new trial upon that ground. If the decision has not been filed, when the motion is heard, the court must make an order for a new trial, either absolutely, or unless it is filed, within a time specified in the order. If an order for a new trial is made, or a contingent order for a new trial becomes absolute, the costs of the former trial abide the event.

Decision upon trial by the court, when to be filed; consequence of failure.

§ 1011. Except in a case specified in the next section, the whole issue, or any of the issues in an action, either of fact or of law, must be referred, upon the consent of the parties, manifested by a written stipulation, signed by their attorneys, and filed with the clerk. Where the stipulation does not name the referee, he may be designated by the court, on motion of either party. Where the stipulation names the referee, the clerk must enter an order, of course, referring the issue or issues for trial, to that person only. If the referee named in a stipulation refuses to serve, or if a new trial of an action tried by a referee so named is granted, the court must appoint another referee, unless the stipulation expressly provides otherwise.

Reference by consent; when and how made.

§ 1012. But a reference shall not be made, of course, upon the consent of the parties, in an action to annul the marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the Attorney-General; or an action wherein a defendant, to be affected by the result of the trial, is an infant. In a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee.

Qualification of the last section.

§ 1013. The court may, of its own motion, or upon the application of either party, without the consent of the other, direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account, on either side, and will not require the decision of difficult questions of law. In an action, triable by the court, without a jury, a reference may be made, as prescribed in this section, to decide the whole issue, or any of the issues; or to report the referee's finding, upon one or more specific questions of fact, involved in the

Compulsory reference for the trial of issues; in what cases it may be made.

§ 1014. Where a reference is made, as prescribed in the last section, to report upon a specific question of fact, involved in the issue, and the determination of one or more other issues is necessary, in order to

Proceedings where the reference is for

TITLE 2.

trial of part of the issues.

enable the court to render judgment, they must be tried, either before or after the filing of the report, as the court directs, and either by a jury, or by the court, without a jury, as the case requires. Where they are tried by a jury, application for judgment must be made upon the verdict and the report.

Compulsory reference upon questions incidentally arising.

§ 1015. The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court; and also to determine and report upon a question of fact, arising in any stage of the action, upon a motion, or otherwise, except upon the pleadings.

Referee to be sworn.

§ 1016. A referee, appointed as prescribed in either of the foregoing sections of this title, must, before proceeding to hear the testimony, be sworn faithfully and fairly to try the issues, or to determine the questions referred to him, as the case requires, and to make a just and true report, according to the best of his understanding. The oath may be administered by an officer specified in section eight hundred and forty-two of this act. But where all the parties, whose interests will be affected by the result, are of age, and present, in person or by attorney, they may expressly waive the referee's oath. The waiver may be made by written stipulation, or orally. If it is oral, it must be entered in the referee's minutes.

Witnesses may be subpœnaed.

§ 1017. A witness may be subpœnaed to attend before a referee, appointed as prescribed in either of the foregoing sections of this title, to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.

General powers of a referee, upon a trial.

§ 1018. The trial, by a referee, of an issue of fact, or of an issue of law, must be brought on upon like notice, and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner, as where the trial is by the court, without a jury. The referee exercises, upon such a trial, the same power as the court, to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons, or to the pleadings; to compel the attendance of a witness by attachment; and to punish a witness for a contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any question, arising upon the decision of the issue referred to him. The powers, conferred by this section, are exercised in like manner, and upon like terms, as similar powers are exercised by the court upon a trial.

Referee's report; when to be made; consequence of failure.

§ 1019. Upon the trial, by a referee, of an issue of fact, or an issue of law, his written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause is finally submitted; otherwise either party may, before it is filed or delivered, serve a notice, upon the attorney for the adverse party, that he elects to end the reference. In such a case, the action must thenceforth proceed, as if the reference had not been directed; and the referee is not entitled to any fees.

Double or other in-

§ 1020. Where the double, treble, or other increased damages are

given by statute, the decision of the court, or the report of the referee, must specify the sum awarded as single damages, and direct judgment for the increased damages. Increased damages.

§ 1021. The decision of the court, or the report of a referee, upon the trial of a demurrer, must direct the final or interlocutory judgment to be entered thereupon. Where it directs an interlocutory judgment, with leave to the party in fault to plead anew or amend, or permitting the action to be divided into two or more actions, and no other issue remains to be disposed of, it may also direct the final judgment to be entered if the party in fault fails to comply with any of the directions given or terms imposed. Decision of court or report of referee, upon trial of demurrer.

§ 1022. The decision of the court, or the report of the referee, upon the trial of the whole issue of fact, must state separately the facts found, and the conclusions of law; and it must direct the judgment, to be entered thereupon. In an action, where the costs are in the discretion of the court, the decision or report must award or deny costs; and, if it awards costs, it must designate the party to whom costs, to be taxed, are awarded. Id.; upon trial of the whole issue of fact.

§ 1023. Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts, which he deems established by the evidence, and of the rulings upon questions of law, which he desires the court or the referee to make. The statement must be in the form of distinct propositions of law, or of fact, or both, separately stated; each of which must be numbered, and so prepared, with respect to its length, and the subject and phraseology thereof, that the court or referee may conveniently pass upon it. At or before the time, when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file, or return to the attorney, the statement thus noted; but an omission so to do does not affect the validity of the decision or report. Parties may require court or referee to determine particular questions.

§ 1024. A referee, appointed by the court, must be free from all just objections; and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation. A judge cannot be appointed a referee, in an action brought in the court, of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee. Qualifications of a referee.

§ 1025. Where the court is authorized to appoint a referee, it may, in its discretion, appoint either one or three. And where a reference is made by consent of the parties, they may select any number of referees, not exceeding five. Several referees may be appointed.

§ 1026. Where the reference is to more than one referee, all must meet together, and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question which arises upon the trial, sign a report, or settle a case. Either of them may administer an oath to a witness; and a majority of those present, at a time and place appointed for the trial, may adjourn the trial to a future day. Proceedings regulated where there are several referees.

TITLE III.

Trial jurors, except in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

ARTICLE 1. Qualifications and exemptions of trial jurors.
2. Mode of selecting, drawing, and procuring the attendance of trial jurors, in ordinary cases.
3. Mode of striking and procuring a special jury, and of procuring a foreign jury.
4. Penalties for non-attendance.

ARTICLE FIRST.

QUALIFICATIONS AND EXEMPTIONS OF TRIAL JURORS.

SECTION 1027. Qualifications of trial jurors.
1028. Additional provision respecting property qualifications.
1029. Certain public officers disqualified.
1030. Persons entitled to claim exemption from service.
1031. Evidence of exemption in certain cases.
1032. When juror to be discharged from serving.
1033. When juror to be excused from serving.
1034. Application of this article, as respects New-York and Kings counties.

Qualifications of trial jurors.

§ 1027. In order to be qualified to serve, as a trial juror, in a court of record, a person must be:

1. A male citizen of the United States, and a resident of the county.
2. Not less than twenty-one, nor more than sixty years of age.
3. Assessed, for personal property, belonging to him, in his own right, to the amount of two hundred and fifty dollars; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of one hundred and fifty dollars; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right.
4. In the possession of his natural faculties, and not infirm or decrepit.
5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed.

Additional provision respecting property qualification.

§ 1028. But a person who was assessed, on the last assessment-roll of the town, for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made, to the value of one hundred and fifty dollars, is qualified to serve as a trial juror, although he does not possess either of the qualifications, specified in subdivision third of the last section, if he is qualified in every other respect.

Certain public officers disqualified.

§ 1029. Each of the following officers is disqualified to serve as a trial juror:

1. The Governor; the Lieutenant-Governor; the Governor's private secretary.
2. The Secretary of State; the Comptroller; the State Treasurer; the Attorney-General; the State Engineer and Surveyor; a Canal Commissioner; an Inspector of State Prisons; a Canal Appraiser; the Superintendent of Public Instruction; the Superintendent of the Bank Department; the Superintendent of the Insurance Department; and the deputy of each officer, specified in this subdivision.

3. A member of the Legislature, during the session of the house, of which he is a member.
4. A judge of a court of record, or a surrogate.
5. A sheriff, under-sheriff, or deputy-sheriff.
6. The clerk or deputy-clerk of a court of record.

Persons entitled to claim exemption from service.

§ 1030. Each of the following persons, although qualified, is entitled to exemption from service, as a trial juror, upon his claiming exemption therefrom:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.
2. A resident officer of, or an attendant, assistant, teacher, or other person, actually employed in, a State asylum for lunatics, idiots, or habitual drunkards.
3. The agent or warden of a State prison; the keeper of a county jail; or a person actually employed in a State prison or county jail.
4. A practicing physician or surgeon, having patients requiring his daily professional attention.
5. An attorney or counsellor at law regularly engaged in the practice of the law, as a means of livelihood.
6. A professor or teacher, in a college or academy.
7. A person actually employed in a glass, cotton, linen, woollen, or iron manufacturing company, by the year, month, or season.
8. A superintendent, engineer, or collector, on a canal, authorized by the laws of the State, which is actually constructed and navigated.
9. A master, engineer, assistant-engineer, or fireman, actually employed upon a steam-vessel, making regular trips.
10. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or an operator, or assistant-operator, employed by a telegraph company; who is actually doing duty in an office, or along the railroad or telegraph line of the company, by which he is employed.
11. An officer, non-commissioned officer, musician, or private of the national guard of the State, performing military duty; or a person, who has been honorably discharged from the national guard, after five years' service, in either capacity.
12. A person who has been honorably discharged from the military forces of the State, after seven years' faithful service therein. But in order to entitle a person to exemption, under this subdivision, his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as a general or staff-officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop of the militia of the State, and armed, uniformed, and equipped, according to law; or a portion thereof, during that period and in that capacity, and the remainder, since the twenty-third day of April, eighteen hundred and sixty two, as a member of the national guard of the State.
13. A member of a fire company, or fire department, duly organized according to the laws of the State, and performing his duties therein; or a person who, after faithfully serving five successive years in such a fire company, or fire department, has been honorably discharged therefrom.
14. A person otherwise specially exempted by law.

Evidence of exemption in certain cases.

§ 1031. The evidence of the right to exemption, as prescribed in the last section, is as follows:

Under subdivision second thereof, the certificate of the superintendent, or other principal officer of the asylum.

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2. Under subdivision third thereof, the certificate of the warden, or other principal officer, of the State prison, or the sheriff of the county, as the case requires.

3. Under subdivision eleventh thereof, where the applicant is a non-commissioned officer, musician, or private, in a company or troop of the national guard, the certificate of the commanding officer of the company or troop, accompanied with proof, by affidavit, of the genuineness of the signature thereto.

4. Under the last clause of subdivision eleventh, or under subdivision twelfth thereof, in the discretion of the court, the discharge of the person from military service, if it shows the facts entitling him to exemption.

5. Under the first clause of subdivision thirteenth thereof, where the applicant is under the rank of foreman, the certificate of the foreman, or other chief officer, of the company, to which the applicant belongs, accompanied with proof, by affidavit, of the genuineness of the signature thereto.

6. Under the last clause of subdivision thirteenth thereof, the certificate of the chief engineer of the fire department of the city or village, where the service was performed, or of the mayor or president of the city or village.

A certificate, specified in this section, must be dated within three months before the time of presenting it, and filed with the clerk of the court, to which it is presented.

When juror to be discharged from serving.

§ 1032. The court must discharge a person from serving as a trial juror, in either of the following cases:

1. Where it satisfactorily appears that he is not qualified.

2. Where it satisfactorily appears that he is exempt, and he claims the benefit of the exemption.

Where a person is discharged, for either of the causes specified in this section, the clerk must destroy the ballot, containing his name.

When juror to be excused from serving.

§ 1033. Upon satisfactory proof of the facts, a court, at the term to which a person is returned as a trial juror, must excuse him from serving during the whole, or a portion of the term, in either of the following cases:

1. Where he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror.

2. Where he is a teacher in a school, actually employed and serving as such.

3. Where, for any other reason, the interests of the public, or of the juror, will be materially injured by his attendance; or his own health, or the health of a member of his family, requires his absence; or he is temporarily incapacitated, for any reason, from properly discharging the duties of a juror.

Where a person is excused, in either of the cases specified in this section, the ballot, containing his name, must be returned to the box from which it was taken.

Application of this article, as respects New York and Kings counties.

§ 1034. Section ten hundred and twenty-nine of this act applies throughout the State. The remainder of this article does not apply to the city and county of New-York, or the county of Kings.

ARTICLE SECOND.

MODE OF SELECTING, DRAWING, AND PROCURING THE ATTENDANCE OF TRIAL JURORS, IN ORDINARY CASES.

SECTION 1035. Certain town officers to make lists of trial jurors.
1036. Names of jurors to be taken from assessment-roll.
1037. Duplicate juror lists to be made and filed.
1038. County clerk to make and deposit ballots.
1039. County clerk to destroy old ballots.
1040. Jurors so returned to serve for three years.
1041. Wards of certain cities to be considered towns, etc.
1042. When and how many jurors, for courts of record, to be drawn.
1043. Notice of drawing.
1044. Sheriff and county judge to attend drawing.
1045. Sheriff or county judge, not appearing, to be again notified, etc.
1046. Certain officers required to be present at drawing.
1047. Mode of drawing jurors; minute of drawing; list to be delivered to sheriff.
1048. Sheriff to notify jurors and make return.
1049. Applicants to be furnished with copies of jury lists.
1050. Names of jurors who have served, to be kept in separate box.
1051. Jurors to be drawn from that box, when first box is exhausted.
1052. A third jury box to be kept.
1053. When old ballots therein to be destroyed, and new ballots deposited.
1054. Jurors, when to be drawn from third box.
1055. How such jurors to be notified.
1056. Justice of supreme court, or county judge, may order drawing of additional jurors.
1057. Proceedings upon such order.
1058. For what courts, and by whom, additional jurors may be ordered.
1059. How such additional jurors drawn and notified.
1060. Power of county judge, as to attendance of jurors.
1061. Powers of deputy county clerk, under this article.
1062. This article not applicable to New-York and Kings counties.

Certain town officers to make lists of trial jurors.

§ 1035. The supervisor, town clerk and assessors of each town, must meet on the first Monday of July, in the year one thousand eight hundred and seventy-eight, and in each third year thereafter, at a place within the town, appointed by the supervisor; or, in case of his absence, or of a vacancy in his office, by the town clerk; for the purpose of making a list of persons, to serve as trial jurors, for the then ensuing three years. If they fail to meet, on the day specified in this section, they must meet as soon thereafter, as practicable.

Names of jurors to be taken from assessment roll.

§ 1036. At the meeting, specified in the last section, the officers present must select, from the last assessment-roll of the town, and make a list of, the names of all persons, whom they believe to be qualified to serve as trial jurors, as prescribed in the last article.

Duplicate jury lists to be made and filed.

§ 1037. Duplicate lists of the names of the persons so selected, showing the place of residence, and other proper additions, of each of them, as far as those particulars can be conveniently ascertained, must be made out, and signed by the officers, or a majority of them. Within ten days after the meeting, one of the lists must be transmitted, by those officers, to the county clerk, and filed by him; and the other must be filed with the town clerk.

County clerk to make and deposit ballots.

§ 1038. On the first Monday of August, after the lists have been transmitted to him, the county clerk must prepare suitable ballots, by writing the name of each person thus selected, as contained in the lists, with his place of residence, and other additions on a separate piece of

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paper. The ballots must be uniform, as nearly as may be, in appearance; and the clerk must deposit them in the box, kept for that purpose.

County clerk to destroy old ballots.

§ 1039. Before depositing the ballots, the county clerk must destroy each ballot, remaining in either of the boxes kept by him, and containing the name of a resident of a town, for which a new list has been transmitted. If, for any reason, the list from a town is not received by the clerk, by the first Monday of August, it, or a new list, to be made as prescribed for making the original list, must be transmitted, as soon thereafter as practicable; and the county clerk must prepare new ballots, and destroy the old ballots, containing the names of residents of that town, immediately after the receipt by him, of the list therefrom.

Jurors so returned to serve for three years.

§ 1040. Each person, whose name is contained in a list, so transmitted, must, unless he is excused or discharged, serve, as a trial juror, for three years from the first Monday of August of that year, and thereafter until another list, from his town, is received and filed.

Wards of certain cities to be considered towns. Rule in other cities.

§ 1041. Each ward of the city of Albany, or Utica, is considered a town, for the purposes of this article; and the supervisor and assessor of that ward must execute the duties of the supervisor, town clerk, and assessors of a town, as prescribed in the foregoing sections of this article; except that a duplicate of the list of jurors, made by them, must be filed in the office of the clerk of the city. In each of the other cities of the State, the like duties must be performed by the officers, and in the manner, prescribed by law. A city wherein two or more assessors are elected for the entire city, is considered a town, for the purposes of this article, except where the officers who are to perform the duties of the supervisor, town clerk or assessor, as prescribed in this article, are specially designated by law.

When and how many jurors, for courts of record, to be drawn.

§ 1042. On a day, designated by the county clerk, not less than fourteen, nor more than twenty days, before the day appointed for holding each term of the circuit court; or of the court of oyer and terminer, where a circuit court is not appointed to be held at the same time; or of the county court, except a term designated for the hearing and decision of motions, and trial and other proceedings, without a jury; or of the court of sessions, where a term of the county court is not appointed to be held at the same time; or of a mayor's or recorder's court, at which issues are triable by a jury; or on the day to which the drawing is adjourned, as prescribed in section one thousand and forty-five of this act, the clerk of the county, in which the term is to be held, must draw the names of thirty-six persons, and any additional number, ordered according to law, to serve as trial jurors at the term.

Notice of drawing.

§ 1043. At least six days before the drawing, the county clerk must publish a notice thereof, in a newspaper published in the county, if there is one; or, if there is none, he must affix a notice thereof, on the outer door of the building, where the term, for which the jurors are to be drawn, is appointed to be held. He must also, at least three days before the time appointed for the drawing, cause notice thereof to be served upon the sheriff of the county, and upon the county judge, or in case of his absence, upon the special county judge, or, in a county where there is no special county judge, upon a justice of sessions.

Sheriff and county judge to attend drawing.

§ 1044. At the time so appointed, the sheriff of the county, or his under-sheriff, and the county judge, or, if notice has been served upon another officer, in the absence of the latter, as prescribed in the last

section, either the county judge, or that officer, or both, must attend at the clerk's office of the county, to witness the drawing of the jurors.

Sheriff or county judge, not appearing, to be again notified, etc.

§ 1045. If the sheriff or under-sheriff, and either the county judge, or, in a case specified in the last section, an officer in place of the county judge, do not appear, the clerk must adjourn the drawing of the jurors to the next day. Thereupon, the clerk must forthwith cause to be served upon the absent sheriff or county judge, or two or more justices of the peace of the county, notice to attend the drawing on the adjourned day.

Certain officers required to be present at drawing.

§ 1046. If the sheriff or under-sheriff, and the county judge, or if the sheriff, under-sheriff, or county judge, together with two justices of the peace of the county, appear at the adjourned day, but not otherwise, the clerk must proceed, in the presence of the officers so appearing, to draw the jurors.

Mode of drawing jurors; minute of drawing; list to be delivered to sheriff.

§ 1047. The drawing must be conducted as follows:

1. The clerk must shake the box containing the ballots, so as thoroughly to mix them.

2. He must then, without seeing the name contained in any ballot, publicly draw out of the box one ballot; and continue to draw, in like manner, one ballot at a time, until the requisite number has been drawn.

3. A minute of the drawing must be kept, by one of the attending officers, in which must be entered the name contained in each ballot drawn, before another ballot is drawn.

4. If, after drawing the requisite number, the name of a person has been drawn, who is dead, or insane, or who has permanently removed from the county, to the knowledge of an attending officer, an entry of that fact must be made in the minute of the drawing, and the ballot, containing that person's name, must be destroyed. Whereupon, another ballot must be drawn, in its place, and the name contained therein must be entered, in like manner, in the minute of the drawing.

5. The same proceedings must be had, as often as necessary, until the requisite number of jurors has been obtained.

6. The minute of the drawing must then be signed by the clerk, and the other attending officers, and filed in the clerk's office.

7. A list of the names of the persons so drawn, showing the place of residence, and other proper additions, of each of them, and specifying for what court and term they were drawn, must be made and certified by the clerk, and the other attending officers, and delivered to the sheriff of the county.

Sheriff to notify jurors and make return.

§ 1048. The sheriff must, at least six days before the day appointed for holding the term, serve, upon each person named in the list, personally, or by leaving it at his residence, with a person of proper age and discretion, a written notice to attend the term. He must file the list with the clerk of the court, at or before the opening of the term; with a return, indorsed thereupon, or annexed thereto, under his hand, naming each person notified, and specifying the manner in which he was notified.

Applicants to be furnished with copies of jury lists.

§ 1049. The county clerk, or the sheriff, must furnish a copy of the list of trial jurors, drawn to attend a term, to any person applying to him therefor, and paying the fees allowed by law.

Names of jurors who have served, to be kept in

§ 1050. After the adjournment of the term, at which trial jurors have been returned, as prescribed in the last section but one, the clerk must deposit the ballots, containing the names of those who attended and served, in another box, kept by him. The ballots, containing the

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separate box.

names of those who did not appear and serve, which have not been destroyed, as prescribed in article first of this title, must be returned to the box from which they were taken.

Jurors to be drawn from that box, when first box is exhausted.

§ 1051. If, at the time of drawing trial jurors for a term, there is not a sufficient number of ballots remaining in the first box, the clerk, after drawing all the ballots therein, must draw the necessary number from the second box, containing the names of those jurors who have before served, as prescribed in the last section; and must continue to draw from that box, until new lists of jurors are transmitted by the town officers.

A third jury box to be kept.

§ 1052. The county clerk must keep, in addition to the two boxes specified in the last two sections, a third box, in which he must deposit duplicate ballots, containing the names, with the proper additions, of all persons, selected and returned as trial jurors, who reside in the city or town, where a trial term of a court of record is appointed to be held, pursuant to law.

When old ballots therein to be destroyed, and new ballots deposited.

§ 1053. The ballots, kept in the third box, must be destroyed by the clerk, and new ballots must be deposited therein by him, at the same time, and under like circumstances, as prescribed in this article, with respect to the destruction of the old ballots, and the depositing of new ballots, in the first box.

Jurors, when to be drawn from third box.

§ 1054. If a sufficient number of trial jurors, duly drawn and notified, do not attend or cannot be obtained, to form a jury, the court may, in its discretion, direct the sheriff to draw from the third box, in the presence of the court, the names of as many persons, as the court deems sufficient for that purpose.

How such jurors to be notified.

§ 1055. The sheriff must forthwith notify each person so drawn, and make a return, as prescribed in title fifth of this chapter, where talesmen are required to attend; and the provisions of that title apply to each person so notified.

Justice of supreme court, or county judge, may order drawing of additional jurors.

§ 1056. A justice of the supreme court, appointed to hold a term of the circuit court, or to preside at a term of the court of oyer and terminer, may, by an order under his hand, direct that such a number of jurors, as he deems necessary, not exceeding twenty-four, be drawn for that term, in addition to the thirty-six jurors, to be drawn as prescribed in the foregoing sections of this article. A county judge may, in like manner, direct the drawing of a like additional number of jurors, for a term of the county court, or of the court of sessions, to be held in his county.

Proceedings upon such order.

§ 1057. An order, made as prescribed in the last section, must be delivered to the clerk of the county, in which the term is to be held, at least twenty days before the day appointed for the commencement thereof; and the clerk must forthwith file it. This article applies to the additional jurors, so required to be drawn.

For what courts, and by whom, additional jurors may be ordered.

§ 1058. At a term of the circuit court, or court of oyer and terminer, or of the county court, or court of sessions, an order may be made by the court, requiring the clerk of the county to draw, and the sheriff to notify, any number of trial jurors, specified in the order, which the court deems necessary, to attend that term, or a term thereafter to be held, either by original appointment or by adjournment, at the commencement thereof, or on a particular day, specified in the order.

How such additional jurors drawn and notified.

§ 1059. The clerk must thereupon forthwith bring into court, all the boxes, wherein ballots, containing the names of trial jurors are deposited, as prescribed in this article; and must, in the presence of the court, publicly draw from such box or boxes as the court directs, the

number of trial jurors specified in the order. The clerk must make and certify two lists of the persons so drawn; and must file one list in his office, and deliver the other to the sheriff. The sheriff must thereupon immediately notify each person so drawn, to attend, as specified in the order.

Power of county judge, as to attendance of jurors.

§ 1060. The county judge may, at the time of drawing trial jurors to attend a term of the county court, or court of sessions, make an order, designating a particular day, during the term, when the jurors must attend, or two or more particular days, upon each of which a portion of the jurors must attend. The sheriff must thereupon notify them to attend, as specified in the order.

Powers of deputy county clerk, under this article.

§ 1061. The deputy county clerk possesses, in the absence of the county clerk from his office, or from the sitting of a term of the court, the powers conferred by this article upon the county clerk.

This article not applicable to New York and Kings counties.

§ 1062. This article does not apply to the city and county of New-York, or to the county of Kings.

ARTICLE THIRD.

MODE OF STRIKING AND PROCURING A SPECIAL JURY, AND OF PROCURING A FOREIGN JURY.

SECTION 1063. What courts may order a special jury to be struck.
1064. Party obtaining order to give eight days' notice.
1065. Mode of striking jury.
1066. Jurors so drawn to be notified to attend.
1067. Jury to be formed as in other cases.
1068. Provision where clerk or commissioner of jurors is interested.
1069. Party applying for special jury to pay expenses.
1070. Copy of order for foreign jury to be delivered to sheriff.
1071. Mode of obtaining a foreign jury.

What courts may order a special jury to be struck.

§ 1063. Where it appears to the court, that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action, pending in the supreme court, or in a superior city court, cannot be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck, for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend.

Party obtaining order to give eight days' notice.

§ 1064. Unless the order specifies, or directs the officer, who is to strike the jury, to fix, a time for the parties to attend, the party obtaining it must give at least eight days' notice of the time, when he will attend, before the clerk of the county in which the action is triable, or, if it is triable in the city and county of New-York, or the county of Kings, before the commissioner of jurors, or, if it is triable in the superior court of Buffalo, before the clerk of that court, for the purpose of having the jury struck.

Mode of striking jury.

§ 1065. At the time appointed, the clerk, or, in his absence, the ty-clerk, or the commissioner, as the case requires, must attend at fice, with the original lists or books, filed or kept in his office, as ed by law, containing the names of the persons who are then to serve as trial jurors; and, in the presence of the parties, or attorneys or counsel, must strike a trial jury, as follows:

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1. The clerk, deputy-clerk, or commissioner, must select from the lists or books, the names of forty-eight persons, whom he deems most indifferent between the parties, and best qualified to try the issue; and must make and certify a list of those names.

2. The party, on whose application the special jury was directed to be struck, or his attorney or counsel, may then first strike from the list one name; the adverse party or his attorney or counsel may then strike therefrom one name; and so alternately, until each party has stricken out twelve names.

3. If either party fails to attend, at the time and place of striking the jury, or neglects to strike out a name, the clerk, deputy-clerk, or commissioner, must strike for him.

4. The clerk, deputy-clerk, or commissioner, must thereupon make out a list of the names of the twenty-four persons not stricken out, and must certify that it is a correct list of the persons, drawn to serve as jurors, pursuant to the order of the court. He must immediately deliver the list so certified, and a certified copy of the order, to the sheriff of the county. If the list, from any ward or town cannot be found, the clerk must make a new list from the ballots then in use for jurors for that ward or town, and must use that list upon striking the jury, in place of the original list.

Jurors so drawn to be notified to attend.

§ 1066. The sheriff must notify the persons whose names are contained in the list, and must return the names of those notified, to the term, at which they are required to attend, as prescribed by law for notifying and returning ordinary trial jurors.

Jury to be formed as in other cases.

§ 1067. From the persons so notified and attending, a jury must be formed for the trial, and the issue must be tried, as prescribed in this chapter with respect to an ordinary jury trial. The court has the same power to excuse or discharge a juror, and to cause additional jurors to be drawn, or talesmen to attend, as upon an ordinary jury trial. But the court may, in its discretion, set aside an additional juror so drawn, or a talesman, upon the objection of either party, without a formal challenge.

Provision where clerk or commissioner of jurors is interested.

§ 1068. If it appears to the court, to which an application for a special jury is made, that the clerk, or the commissioner of jurors, as the case may be, is interested in the action; or is related to either of the parties; or is not indifferent between them; the court must appoint two disinterested persons to strike the jury. The persons so appointed possess, for the purposes of the action, all the powers conferred, by this article, upon the clerk, or the commissioner of jurors.

Party applying for special jury to pay expenses.

§ 1069. The expense of striking a special jury must be paid by the party applying for it, and shall not be taxed in the costs of the action.

Copy of order for foreign jury to be delivered to sheriff.

§ 1070. Where an order for a trial by a foreign jury is made, a certified copy thereof must be delivered to the sheriff of the county, from which it is to be drawn; who must give notice thereof to the clerk of that county, and also, in the city and county of New-York, or the county of Kings, to the commissioner of jurors, at least twenty days before the first day of the term, at which the foreign jury is required to attend.

Mode of obtaining a foreign jury.

§ 1071. The clerk, or, in the county of Kings, the commissioner, to whom the notice is given, must draw the names of twenty-four persons, in the same manner, and in presence of the same officers, as prescribed by law, with respect to ordinary trial jurors; except that notice of the drawing need not be published. A certified list of the names drawn must be delivered to the sheriff, who must notify each person drawn, and make a return, as in an ordinary case.

ARTICLE FOURTH.

Penalties for Non-Attendance.

Section 1072. Fine to be imposed for non-attendance.
1073. Order to show cause, when juror was not personally notified.
1074. Id.; if default was at circuit.
1075. Duty of clerk and sheriff.
1076. Proceedings upon return of such order.
1077. When proceedings to cease.
1078. This article not applicable to New-York and Kings counties.

Fine to be imposed for non-attendance.

§ 1072. A person duly notified, as prescribed in this title, to attend a term of a court of record, as a trial juror, who, without reasonable cause, neglects to attend, according to the notice, shall be fined a sum, not less than ten dollars nor more than twenty-five dollars, for each day that he so neglects to attend.

Order to show cause, when juror was not personally notified.

§ 1073. Where it appears, by the return of the sheriff, that the delinquent was personally notified to attend, the fine may be imposed by the court, at the term which he was required to attend. But where it appears, by the return, that he was notified, by leaving the notice at his residence, the court must cause an order to be entered in its minutes, requiring him to show cause, on the first day of the next term of the court, why a fine should not be imposed upon him.

Id.; if default was at circuit.

§ 1074. If the order is made at a term of a circuit court, it may, in the discretion of the court, direct the delinquent to show cause, on the first day of the next term of the county court of the same county.

Duty of clerk and sheriff.

§ 1075. The clerk must immediately deliver two certified copies of the order to the sheriff of the county, who must serve one copy on the delinquent personally, and return the other, with his proceedings thereon, to the term at which the delinquent is required to show cause.

Proceedings upon return of such order.

§ 1076. If the sheriff returns the copy of the order as personally served, or if the delinquent attends, in obedience thereto, the court must, unless good cause is shown to the contrary, impose the proper fine; otherwise it must make a further order, requiring the delinquent to show cause at the next term, why the fine should not be imposed. The proceedings under such an order are the same as under the first order. Similar orders must be made, from term to term, and similar proceedings taken, until the delinquent is personally served, or attends in obedience thereto.

When proceedings to cease.

§ 1077. But if it appears, from the return of the sheriff, or from any other evidence, that the juror is dead, or insane, or has permanently removed from the county; or if a satisfactory excuse is rendered by any person, in his behalf, for his default, the court may, in its discretion, discontinue the proceedings.

This article not applicable to New York and Kings counties.

§ 1078. This article does not apply to the city and county of New-York, or to the county of Kings.

TITLE IV.

Trial jurors in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

ARTICLE 1. Provisions relating to trial jurors in the city and county of New-York.
2. Provisions relating to trial jurors in the county of Kings.

ARTICLE FIRST.

PROVISIONS RELATING TO TRIAL JURORS IN THE CITY AND COUNTY OF NEW-YORK.

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1081. Persons exempt from service.
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1123. Id.; for officer accepting bribes, etc.
1124. Id.; for concealing offer to take bribe, etc.
1125. False swearing; when perjury.

Qualifications of trial jurors.

§ 1079. In order to be qualified to serve, as a trial juror, in a court in the city and county of New-York, a person must be:

1. A male citizen of the United States, and a resident of that city and county.

2. Not less than twenty-one, nor more than seventy years of age.

3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value.

4. In the possession of his natural faculties, and not infirm or decrepit.

5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly.

Who deemed a resident.

§ 1080. A person dwelling or lodging in the city and county of New-York, for the greater part of the time, between the first day of October and the thirtieth day of June next thereafter, is a resident of that city and county, for that jury year, within the meaning of the last section; and it is not necessary, that he should have been assessed, or should have voted there.

Persons exempt from service.

§ 1081. Either of the following persons, although qualified, is entitled to an exemption from service, as a trial juror, upon his claiming an exemption, as prescribed in this article:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.

2. A practicing physician, surgeon, or surgeon dentist, having patients requiring his daily professional attention, and not following any other calling.

3. An attorney or counsellor at law regularly engaged in the practice of the law, as a means of livelihood.

4. A professor or teacher in a college, academy, or public school, not following any other calling.

5. The holder of an office, under the United States, or the State, or the city or county of New-York, whose official duties, at the time, prevent his attendance as a juror.

6. A consul of a foreign nation.

7. A captain, engineer, or other officer, actually employed upon a vessel, making regular trips; or a licensed pilot, actually following that calling.

8. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or a telegraph operator, employed by a telegraph company; who is actually doing duty in an office, or along the railroad or telegraph line of the company, by which he is employed.

9. A grand juror, or a sheriff's juror, for the year, selected pursuant to law.

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10. An officer, non-commissioned officer, musician, or private, actually serving in a brigade, regiment, battalion, company, or troop, of the national guard of the State, uniformed and equipped, according to law, and faithfully performing his duty, by making the parades, and attending the drills, inspections, and reviews, required by law; or a general or staff-officer, actually performing duty as such; or a person who has been honorably discharged from the national guard, after five years' service, in either capacity.

11. A person who has been honorably discharged from the military forces of the State, after seven years' faithful service therein. But in order to entitle a person to exemption, under this subdivision, his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as a general or staff-officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop, of the militia of the State, and armed, uniformed, and equipped, according to law; or a portion thereof, during that period and in that capacity, and the remainder, since the twenty-third day of April, eighteen hundred and sixty-two, as a member of the national guard of the State.

12. A person who, after faithfully performing the duties of a fireman, in a fire company or fire department, duly organized according to the laws of the State, for five successive years, has been honorably discharged therefrom.

13. A person who is physically incapable of performing jury duty, by reason of severe sickness, deafness, or other physical disorder.

14. A person holding office under the fire or police department of the city; or otherwise specially exempted by law.

Evidence of right to exemption in certain cases.

§ 1082. The evidence of the right to exemption, as prescribed in the last section, is as follows:

1. Under subdivision tenth thereof, where the applicant is a member of a company or troop, the certificate of the captain, or other commanding officer thereof, dated within three months of the time of presenting it. Or the commissioner of jurors may, in his discretion, receive the certified list, specified in the next section, as sufficient evidence thereof. Where the applicant is a regimental officer, or a staff-officer, the evidence of the right to exemption is the certificate of the major-general, or other officer, commanding the first division.

2. Under subdivision tenth thereof, where the applicant has been discharged, or under subdivision eleventh or twelfth, the certificate of discharge; and, where it does not show all the facts, the affidavit of the applicant, or of another person acquainted with the facts.

3. Under subdivision thirteenth thereof, the certificate of a reliable physician, or the affidavit of the applicant, or both; or any other evidence satisfactory to the commissioner.

4. Under any other subdivision thereof, an affidavit of the applicant, or an affidavit satisfactory to the commissioner, of another person in his behalf, stating the facts, entitling the applicant to exemption. Each certificate specified in this section, must be accompanied with satisfactory proof, by affidavit, of the genuineness of the signature thereto; and each affidavit and certificate must be filed with the commissioner of jurors, and must be kept open by him, at all reasonable times, to public inspection.

Military officers required to certify to commissioner.

§ 1083. The captain, or other commanding officer, of each company or troop, in the first division of the national guard, must deliver to the commissioner of jurors, on or before the first day of July in each year,

and at any other time when he may require it, a list, certified by him, containing the full name and residence of each member and officer of his company or troop, who is uniformed and equipped, and faithfully performs his duty, as prescribed in subdivision tenth of the last section but one. No other name shall be inserted in the list. The list must be filed in the commissioner's office. The major-general, or other officer, commanding that division, must, when necessary, issue orders to carry this section into effect. He must also furnish to the commissioner of jurors, when so required, a list, certified by him, containing the name and residence of each officer or other member of that division, not comprised in the lists of the companies and troops. An officer, who neglects or refuses to perform the duty, specified in this section; or who includes, in a list certified by him, the name of a person who is not described in this section; or who gives a false certificate, in a case specified in the last section; forfeits the sum of fifty dollars for each offence.

sioner persons performing full military duty.

§ 1084. The jury year, in the city and county of New-York, commences on the first day of October. A person who has actually served, as a trial juror, in a court of record of the State, within that city and county, twelve days within a jury year, is entitled to be discharged by the court; except that he shall not be discharged, until the close of a trial, in which he is serving, when the twelve days expire. A person discharged, as prescribed in this section, is, thereafter, during the same jury year, exempt from jury service in any county of the State. Where the certificates of one or more clerks of the courts, made as prescribed in section ten hundred and eighty-nine of this act, show that a person is entitled to a discharge, as prescribed in this section, the commissioner of jurors must, upon request, certify to the fact. A person cannot serve as a trial juror, in courts of record, at more than two terms in a jury year.

Jury year; length of jury service required and allowed.

§ 1085. The judge, holding a term, may, in his discretion, excuse a trial juror from service at that term, for not more than three days at a time, where the exigencies of his business require his temporary exemption. The judge may also discharge, for the term, one or more jurors, notified and attending, whose further attendance is not required for the trial of issues at that term. Or he may discharge, until a day certain, one or more jurors, notified and attending, whose attendance will not be required, for the trial of issues, until that day. Each juror, so discharged until a day certain, must attend at the opening of the court on that day, and thereafter until he is discharged, without further notice. If he fails so to do, he is liable to the same punishment, and the same proceedings must be taken, as if he had failed to attend, at the time fixed in the notice given to him.

When court may temporarily excuse juror from attendance.

§ 1086. Except as prescribed in the last section, a court or a judge shall not excuse a person, liable to serve as a trial juror, and duly drawn and notified, unless it is shown, by the oath of the juror, or, if he is unable to attend, by the oath of another person, acquainted with the facts, that he is then necessarily absent from the city, and will not return in time to serve; or that the interests of the public, or of the juror, will be materially injured by his attendance; or that he is physically unable to serve; or that his wife, or a near relative of himself or his wife, has recently died or is dangerously sick. Where a person liable to serve is excused, in a case specified in this section, or where a person, notified to attend a term, as a trial juror, is entitled to, and claims an exemption, he can be excused only by the judge, holding the term, which he has been notified to attend. Such an excuse does not extend beyond that term.

In other cases, juror to be excused only on showing certain facts.

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lars for each failure or refusal. One or more successive notices may be served upon the same person, where he fails to attend, as required by a former notice; and he is liable to the same penalty, for each failure so to attend. But the commissioner may, in his discretion, dispense with the personal attendance of a person so notified, where another person, cognizant of the facts, is produced and testifies in his stead: and where a person has so attended twice, he cannot be required to attend again, in the same jury year.

Commissioner to return lists to county clerk; correction of lists.

§ 1096. On or before the first day of October, in each year, the commissioner must return to the clerk of the city and county of New York, to be filed in his office, certified copies of the lists, prepared by him, of the persons, liable to serve as trial jurors in the courts of record, for the ensuing jury year. He may, from time to time thereafter, strike from the lists kept by him, the name of a person, who is found by him to be exempt or disqualified. In that case, he must record the reason why the name is stricken off.

Old ballots to be destroyed and new ballots deposited; supplemental lists; new ballots therefor.

§ 1097. When the certified copies of the lists have been returned, as prescribed in the last section, the ballots for trial jurors, used in the previous year, must be returned, by the county clerk, to the commissioner, who must destroy those which are not required for the current jury year. The ballots for the current jury year must be prepared by the commissioner, who may use, for that purpose, so many of the ballots, prepared for the previous year, as he deems expedient. The ballots, so prepared, must be delivered by the commissioner to the county clerk, and deposited by the county clerk, or his deputy, in a box, as prescribed in article second of title third of this chapter. The commissioner may, from time to time thereafter, return certified copies of additional lists, containing the names of persons, liable to serve as trial jurors, which were omitted from the former lists; and ballots, containing those names, must be prepared in like manner, and used for the residue of the jury year.

Number of jurors to be drawn for each term of court of record.

§ 1098. The number of trial jurors, to be drawn for each term, and each separate part of a term, of a court of record in the city, at which issues of fact are triable by jury, must be fixed by a general order of the court, or, if it is not so fixed for a term, or a separate part of a term, by a written order of the judge, appointed to hold the same. The order, or a certified copy thereof, must be filed in the office of the county clerk. If the number has not been fixed, in either mode, at the time of the drawing, one hundred trial jurors must be drawn for each term, or for each part, if the term consists of two or more separate parts.

When jurors to be drawn; what officers to attend drawing.

§ 1099. On a day, designated by the county clerk, not less than fourteen, nor more than twenty days, before the day appointed for holding, in the city, a term of a court of record, at which issues of fact are triable by jury, the commissioner of jurors, in person, or by an assistant designated by him; the sheriff of the city and county of New-York, in person, or by his under-sheriff; and one or more judges of courts of record, residing in the city, must attend, at the office of the county clerk, to witness and assist in the drawing of trial jurors for the term.

Notice of drawing.

§ 1100. At least six days before the drawing, the county clerk must publish notice thereof, in at least three newspapers, published in the city. He must also cause written notice thereof to be served upon the sheriff, the commissioner of jurors, and at least three judges of one or more courts of record, residing in the city.

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Proceedings if officers do not appear.

§ 1101. If at least one judge of a court of record, residing in the city, and also the commissioner of jurors, and the sheriff, in person, or represented, as prescribed in the last section but one, do not attend, the clerk, or, in his absence, the deputy-clerk, must adjourn the drawing to the next day. Thereupon the clerk must forthwith cause to be served, upon the absent commissioner or sheriff, and upon at least three judges of one or more courts of record, residing in the city, written notice, to attend the drawing upon the adjourned day.

When jury to be drawn on adjourned day.

§ 1102. If the officers, specified in section ten hundred and ninety-nine of this act, attend upon the adjourned day, but not otherwise, the clerk, or, in his absence, the deputy-clerk, must proceed, in their presence, to draw the jurors.

Mode of drawing; minute; lists.

§ 1103. The drawing must be conducted as follows:

1. The county clerk, or his deputy, must shake the box containing the ballots, so as thoroughly to mix them.

2. He must then, without seeing the name contained in any ballot, publicly draw out of the box, one ballot; and continue to draw, in like manner, one ballot at a time, until the requisite number has been drawn.

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name, contained in each ballot drawn, before another ballot is drawn.

4. After drawing the requisite number, the minute of the drawing, containing the names of the persons drawn, with the proper additions of each, and specifying for what court and for what term they were drawn, must be signed by the clerk or his deputy, and the attending officers, and filed in the clerk's office.

Id.; where term consists of two or more parts.

§ 1104. If the term consists of two or more separate parts, the trial jurors for each part must be drawn, and a minute of the drawing must be made, signed, and filed, and the subsequent proceedings must be the same, as if it was a distinct term.

Commissioner may issue notice to jurors drawn.

§ 1105. The commissioner may issue, to a trial juror so drawn, a printed notice, informing him that he has been drawn, and will be duly notified by the sheriff, and containing copies of such portions of this article, as the commissioner deems advisable.

Sheriff to notify jurors and make return

§ 1106. The clerk must deliver, to the sheriff, a certified copy of the minute, or of each minute, if there are two or more. The sheriff must notify each juror, named therein, to attend the term or part, for which he was drawn, by serving upon him, at least six days before the commencement thereof, a notice, addressed to him, stating that he has been drawn as a trial juror for, and is required to attend, the term or part, specified in the notice. The notice may be served personally, or by leaving it at the juror's residence, or usual place of business, with a person of proper age and discretion. Before the commencement of the term or part, the sheriff must file, with the clerk, the certified copy of the minute, with a return, under his hand, indorsed thereupon, or annexed thereto, naming each person notified, and specifying the manner in which he was notified.

Clerk of court to certify as to mode of service.

§ 1107. The clerk of each court, for a term of which trial jurors are ified to attend, by the sheriff, must certify to the clerk of the board alderman,* each case, where less than a majority of the persons, ed in a minute of a drawing, are returned as personally served. board of aldermen are prohibited from allowing or paying any fees harges to the sheriff, for notifying any of the persons named in that nute, or for making a return thereupon. A clerk of a court, who

*So in the original.

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omits to notify the clerk of the board of alderman, as prescribed in this section, is liable to a penalty of one hundred dollars, for each omission, to be recovered by any person suing therefor.

Court may order new panel to be drawn during term.

§ 1108. At any time, during the sitting of a term of a court of record in the city, the court may direct an additional number of trial jurors to be drawn, for the term, or for the part, at which the order is made. The order must specify the number to be drawn, and the time of drawing. The drawing may be made, either in open court, under the direction of the judge; or in the ordinary manner, except that notice is not required. The sheriff must forthwith notify the jurors drawn, by such a notice as the court directs, to attend the term or part, at the time specified in the order.

Court of record to fine juror for non-attendance; power to remit fine.

§ 1109. Where a person, duly drawn, and notified to attend a term of a court of record, as a trial juror, fails to attend, at the time specified in the notice, or from day to day, the court, at that term, must impose upon him a fine of not less than fifty nor more than two hundred and fifty dollars. A fine thus imposed may be wholly or partly remitted, by direction of the judge, in open court, before the end of the same term, and upon good cause shown; otherwise it shall not be remitted, except as prescribed in sections eleven hundred and thirteen and eleven hundred and fourteen of this act. Each remission, so made by the judge, with the reason therefor, must be entered in the minutes of the court. This section applies to a special juror, as well as to an ordinary trial juror.

Juror may also be arrested and compelled to serve.

§ 1110. Where a person, duly drawn and notified, fails to attend and serve, at a term of a court of record, as required by law, without having been excused, the court, besides imposing a fine, as prescribed in the last section, may direct the sheriff to arrest him, and bring him before the court; and, when he has been so brought, it may, in its discretion, compel him to serve.

Jurors for district courts; how selected; punishment for non-attendance; clerk's duty; penalty for neglect.

§ 1111. A list of trial jurors, for each of the district courts, must be selected by the commissioner of jurors; and must consist of not less than fifty, nor more than one hundred jurors. A person shall not be placed upon such a list, who does not reside in the district, in which the court is held. The judge of each district court must impose a fine of twenty-five dollars, upon each person, duly drawn, and notified to attend the court, as a trial juror, who fails to attend, as required by the notice. The clerk of the court must, within ten days thereafter, transmit to the commissioner of jurors a certificate, showing that the fine has been so imposed, and stating how the notice to attend was served upon the delinquent, in order that the same proceedings may be had, as in the case of a delinquent juror in a court of record. A judge, or a clerk, who violates this section, forfeits one hundred and fifty dollars for each offence.

Sheriff's jury; how selected, etc.

§ 1112. The board for the selection of grand jurors must, at the time when it selects the grand jurors for each jury year, also select, from the lists of trial jurors for that year, the names of not less than one hundred and twenty, nor more than one hundred and fifty persons, to constitute the sheriff's jurors, for that jury year. The commissioner of jurors must forthwith transmit, to the sheriff of the city and county of New-York, a list, certified by him, containing the names of the persons so selected, with the proper additions of each, and showing that they have been selected, as prescribed in this section. The sheriff must cause ballots to be prepared, as prescribed in article second of title third of this chapter, and to be deposited in a proper box. Where the sheriff is

authorized or required by law, to empanel a jury for any purpose, the requisite number of ballots must be drawn from the box, as prescribed in that article, by the sheriff, or by his under-sheriff, or deputy-sheriff. But the sheriff may, in his discretion, divide the names contained in the list, into three panels, each containing an equal number of names, as nearly as may be. In that case, he must designate the months, in which each panel will be used, so that the jury duty shall be distributed equally, as nearly as may be, among the jurors; and ballots shall be deposited in the box, at the beginning of each month, containing the names of the jurors designated for that month.

Proceedings before commissioner, to remit or enforce jury fines.

§ 1113. The commissioner of jurors must cause a notice to be served upon each delinquent trial juror, returned as having been fined, stating the amount of the fine, and the term at which he was fined, and requiring him to attend before the commissioner at the latter's office, on a specified day and at a specified hour, and show cause, if he has any, why the fine should be wholly or partly remitted, or why payment of the fine should not be enforced. The notice must be served at least six days before the day therein specified. If the sheriff's return shows that notice to attend, as a trial juror, was personally served upon the person fined, the notice to show cause, as prescribed in this section, may be served upon him either personally, or by leaving it at his residence, or usual place of business, with a person of suitable age and discretion; otherwise it must be served upon him personally. If a person so notified fails to attend, the fine must be enforced. If he attends, he may demand a hearing before the board for the enforcement of jury fines; otherwise the commissioner must decide with respect to the remission of the whole or any part of the fine, and the sufficiency of the cause shown, if any, and his decision is conclusive, with respect to that fine, unless the person fined, within ten days thereafter, serves upon him a written demand of a hearing before the board of enforcement. In that case, the commissioner must appoint a time for the hearing; and the person fined must then attend without further notice.

Board for enforcement of jury fines; proceedings before it.

§ 1114. The presiding justice of the supreme court, in the first judicial department, the chief-judge of the court of common pleas, the chief-judge of the superior court, the chief-justice of the marine court, the mayor, the recorder, the city judge, the judge of the court of general sessions, and the commissioner of jurors, constitute the board for the enforcement of jury fines. The board must meet, at the office of the commissioner of jurors, on the last Monday in October in each year, and on the last Monday of each month thereafter, until and including the following month of June; and as much oftener, as the business before it requires. Three members of the board constitute a quorum. The board, either upon a hearing, or when acting upon the commissioner's decision, as the case requires, has exclusive power, except as in this article otherwise prescribed, to remit the whole or any part of a fine. The board, or the commissioner, may, in its or his discretion, hear testimony, or determine a case upon affidavits; and may, from time to time, adjourn the hearing or final disposition of a particular case.

General powers of board.

§ 1115. The board may compel the attendance of any person, required to appear before it, as prescribed in the last section but one. It may issue a warrant, directed to the sheriff of the city and county of New-[illegible], commanding him to arrest, and bring before the board, a person, [illegible] fails to attend, at the time appointed for hearing his case, or to [illegible] a fine imposed upon him, and not remitted by the board. If a [illegible]inquent trial juror, duly drawn, and returned by the sheriff as per-[illegible]nally notified to attend a term, or personally notified to attend before

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the commissioner, as prescribed in the last section but one, is, in the opinion of the board, able to pay his fine, the board may make an order, directing the sheriff to arrest him, and imprison him in the county jail, until the fine is paid, not exceeding thirty days. The sheriff must obey such an order. The board may make an order, directing that a person, paying a fine imposed upon him, be excused from jury duty, for a period not exceeding one year.

Commissioner to issue warrant to collect fines; sheriff's powers and duties thereupon.

§ 1116. After ten days have expired, since the final decision of the board of enforcement, with respect to a fine, as prescribed in the last section but one, if the fine has not been remitted or paid, the commissioner must issue a warrant, under his hand, directed to the sheriff of the city and county of New-York, reciting the facts, and commanding the sheriff to collect from each person, named in the schedule annexed thereto, the sum, set opposite that person's name in the schedule, and to pay over the same to the commissioner. The schedule must contain the names of persons, fined and notified to show cause, whose fines have not been wholly paid or remitted; it must show the amount of each fine, remaining unremitted or unpaid; and the residence or usual place of business of each person fined, as far as it can be conveniently ascertained. The sheriff must collect each fine, by a levy upon and sale of the personal property of the person fined, as prescribed by law, where an execution against property is issued upon a judgment, rendered in a court of record. The sheriff is entitled, in each case, to the same fees as upon such an execution, to be collected in the same manner. He must return the warrant and schedule, with his proceedings thereupon, to the commissioner, within thirty days after the delivery thereof to him; and must then pay over the money collected, less his fees. His return may be compelled by the supreme court, in the same manner as the return of an execution against property, issued upon a judgment rendered in that court. For his failure to collect a fine, an action may be maintained against him, in a case where such a case* may be maintained by a judgment creditor, against a sheriff failing to collect an execution against property, and with like effect. The provisions of section one thousand one hundred and nineteen of this act apply to such an action.

Uncollected fines to be docketed, and enforced as judgments.

§ 1117. The commissioners* must, within thirty days after the return of the warrant to him, file with the clerk of the court, by which each uncollected fine was imposed, a certificate, to the effect that the warrant has been returned, and showing what fines remain uncollected. Thereupon the clerk must make, in the docket-book of judgments, kept by him, the same entries, as nearly as may be, with respect to each uncollected fine, as if it was a final judgment, rendered in an action. If the fine was imposed by a court, other than the supreme court, the clerk thereof must immediately transmit a transcript of the entries, to the clerk of the city and county of New-York, who must file it, and make the appropriate entries, in his docket-book of judgments. The commissioner must pay the clerk's fees, at the rate allowed for similar services, with respect to judgments. When the entries have been made, the fine, with interest, becomes a lien upon the real property of the person fined, as if it was recovered by a judgment in the same court; and an execution to collect it may be issued, directed to the sheriff of the city and county of New-York, as upon such a judgment. The commissioner has, in relation to the execution, and the

* So in the original.

satisfaction of the fine, all the powers of the attorney for a party recovering such a judgment, in relation to the judgment, and the execution issued thereupon.

Commissioner to receive fines, etc. His account; how rendered and settled.

§ 1118. The commissioner of jurors must receive all money, paid or collected for fines or penalties, as prescribed in this article; and he may make all payments therefrom, which he is authorized by this article to make. He must give a receipt for any money paid to him, for a fine or penalty. He must keep a just and faithful account of all receipts and payments, by items, showing the name of the person, from whom each sum of money was received, and to whom each sum of money was paid; and must, at all reasonable times, keep his account open to public inspection. At the end of each calendar year, his account must be verified by his affidavit, to the effect, that it is, in all respects, just and true; and that he has not received any sum of money, during the year, for which he has not charged himself in the account. The account, thus verified, must be audited and certified, by at least three other members of the board for the enforcement of jury fines; and the commissioner must thereupon pay over, to the chamberlain of the city, the balance, if any, in his hands. The account, thus audited and certified, must immediately be transmitted by the commissioner, to the clerk of the board of aldermen; and must be published in the newspaper, designated, as prescribed by law, for the publication of the official proceedings of city officers.

Corporation attorney to prosecute for penalties; compromise, etc., of action.

§ 1119. The corporation attorney of the city of New-York must, when required by the commissioner of jurors, prosecute, in the proper court, an action for the collection of each penalty, incurred as prescribed in this article; unless he is satisfied, upon an examination of the case, that there is a defence to the action. The action must be maintained in the name of the mayor, aldermen, and commonalty of the city of New-York, as plaintiffs. The commissioner, with the assent of the corporation attorney, may compromise, settle, or discontinue, an action so brought. From the proceeds of an action, prosecuted to judgment and execution, or compromised, as prescribed in this section, the corporation attorney may retain the taxable or taxed costs. He must pay over the remainder, to the commissioner.

Penalty, for physician giving false certificate.

§ 1120. A physician, who knowingly gives a false certificate, or makes a false representation, for the purpose of enabling or assisting a person, to be discharged, excused, or exempted from service as a trial juror in the city and county of New-York, is guilty of a misdemeanor.

Persons required to furnish information; penalty for refusal, etc.

§ 1121. A person, to whom application is made, within the city of New-York, by the commissioner of jurors, or by his authority, for information, as to a fact, upon which the liability of himself, or any other person, to serve as a trial juror, depends, and who refuses to give information relating thereto, which he can give, or knowingly gives false information relating thereto; or a person who knowingly makes to the commissioner of jurors, or to a person acting by his authority, a false representation, as to the identity, residence, or any other matter, relating to the liability of himself, or any other person, to serve as a trial juror, forfeits fifty dollars for each offence.

Punishment for bribery of officer, etc., by juror drawn.

§ 1122. A person who gives, pays, promises, or offers, money, or any other thing, to the commissioner of jurors, the sheriff, the county clerk, or other clerk of a court; or to the deputy of, or a person employed by, the county clerk or other clerk of a court; or to an officer, messenger, or other person, employed by the sheriff, or the commissioner of jurors; for the purpose of enabling or assisting himself, or any other person,

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named or drawn as a trial juror, to evade, or to be discharged, exempted, or excused from service; or who knowingly makes a false statement or representation, to a judge, the commissioner of jurors, or a member of the board of enforcement of jury fines, for such purpose; or who knowingly retains, conceals, suppresses, or wilfully destroys, a notice to attend, before the commissioner of jurors, or at a term of a court, or any other paper, relating to the liability to serve, or service, as a trial juror, left at the residence or place of business of another, who has been named or drawn as a trial juror, is guilty of a misdemeanor. The district-attorney must prosecute for each offence, specified in this or the next two sections, which comes to his knowledge.

Id.; for officer accepting bribes, etc.

§ 1123. An officer, or a person employed by the sheriff, by the commissioner of jurors, or by the county clerk, or other clerk of a court, who takes money, or any other thing, as a gift, bribe, or payment, for the purpose of enabling or assisting a person, named or drawn as a trial juror, to evade, or to be discharged, exempted, or excused from jury duty; or who wilfully and knowingly prevents or hinders the execution of any provision of this article, is guilty of a misdemeanor.

Id.; for concealing offer to take bribe, etc.

§ 1124. A person, named or drawn as a trial juror, to whom an offer or suggestion to procure his discharge, exemption, or excuse from jury duty, for or in consideration of a corrupt inducement or reward, is made by any person, and who fails, within twenty-four hours thereafter, to inform the commissioner of jurors thereof, is guilty of a misdemeanor.

False swearing; when perjury.

§ 1125. A person, who swears falsely in an affidavit, or testifies falsely upon an inquiry, made as prescribed in this article, is guilty of perjury, in a case where falsely swearing, in an affidavit, used upon a motion in a civil action, or falsely testifying, upon the trial of an issue of fact in such an action, would constitute that crime.

ARTICLE SECOND.

Provisions relating to Trial Jurors in the County of Kings.

Section 1126. Qualifications of trial jurors.
1127. Persons exempt from service.
1128. Evidence of right to exemption in certain cases.
1129. Length of jury service required. Notice to juror to attend.
1130. When court to excuse juror from service.
1131. Clerk of court to certify to commissioner, as to attendance, excuses, fines, etc., of jurors.
1132. Commissioner of jurors to select trial jurors; his general powers.
1133. Id.; to receive fees and fines for benefit of county.
1134. Supervisors to provide for his expenses, etc.
1135. Assessors to return persons liable, and commissioner to select jurors.
1136. When commissioner to publish notice, and receive evidence of exemption.
1137. Commissioner to prepare list, and file transcript.
1138. Supplemental lists may be afterwards made.
1139. Ballots to be prepared, and deposited in box.
1140. What officers to attend drawing; how many jurors to be drawn.
1141. Proceedings preliminary to the drawing.
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SECTION 1147. Days for which the jurors are to be notified. Excusing jurors, and changing days of their attendance.
1148. Sheriff to make return of jurors notified.
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1161. Penalty for physician giving false certificate.
1162. Commissioner to report and pay over money.

Qualifications of trial jurors.

§ 1126. In order to be qualified to serve, as a trial juror, in a court of record in the county of Kings, a person must be:

1. A male citizen of the United States, and a resident of that county.

2. Not less than twenty-one, nor more than sixty years of age.

3. The owner, in his own right, of real property, of the value of one hundred and fifty dollars, or of personal property, of the value of two hundred and fifty dollars; or the husband of a woman, who is the owner, in her own right, of real or personal property, of that value.

4. In the possession of his natural faculties; and not infirm or decrepit.

5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly.

Persons exempt from service.

§ 1127. Either of the following persons, although qualified, is entitled to an exemption from service, as a trial juror, upon his claiming an exemption, as prescribed in this article:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.

2. A practicing physician, surgeon, or surgeon dentist, having patients requiring his daily professional attention, and not following any other calling.

3. An attorney or counsellor at law, regularly engaged in the practice of the law, as a means of livelihood.

4. A professor or teacher in a college, academy, or public school, or in a private school for the instruction of pupils in the usual branches of education, not following any other calling.

5. The holder of an office, under the United States, or the State, or the county, or the city of Brooklyn, or a town of the county; whose official duties, at the time, prevent his attendance as a juror.

6. A captain, engineer, or other officer, actually employed upon a vessel, making regular trips; or a licensed pilot, actually following that calling.

7. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or a telegraph operator, employed by a telegraph company, who is actually doing duty in an office, or along the railroad or telegraph line, of the company, by which he is employed.

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8. An officer, non-commissioned officer, musician, or private, actually serving in a brigade, regiment, battalion, company, or troop, of the national guard of the State, uniformed and equipped, according to law, and faithfully performing his duty, by making the parades, and attending the drills, inspections, and reviews, required by law; or a general or staff-officer, actually performing duty as such; or a person who has been honorably discharged from the national guard, after five years' service, in either capacity.

9. A person, who has been honorably discharged from the military forces of the State, after seven years' faithful service therein. But, in order to entitle a person to exemption, under this subdivision, his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as a general or staff-officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop, of the militia of the State, and armed, uniformed, and equipped according to law; or a portion thereof, during that period, and in that capacity, and the remainder, since the twenty-third day of April, eighteen hundred and sixty-two, as a member of the national guard of the State.

10. A person, who, after faithfully performing the duties of a fireman, in a fire company or fire department, duly organized, according to the laws of the State, for five successive years, has been honorably discharged therefrom; or who is, at the time, an officer or member of a fire company, duly organized, according to the laws of the State, and faithfully performing his duty therein.

11. A person, who is physically incapable of performing jury duty, by reason of severe sickness, deafness, or other physical disorder.

12. A person belonging to the army or navy of the United States; or to the police force or fire department of the city of Brooklyn.

13. A person otherwise specially exempted by law.

Evidence of right to exemption in certain cases.

§ 1128. The evidence of the right to exemption, as prescribed in the last section, is as follows:

1. Under subdivision eight thereof, where the applicant is a member of the national guard, below the rank of brigadier-general, the certificate of the commanding officer of the brigade, regiment, battalion, company, or troop, to which the applicant belongs, dated within three months of the time of presenting it.

2. Under subdivision eighth, ninth, or tenth thereof, where the applicant has been discharged, the certificate of discharge; accompanied, where it does not show all the facts, with the affidavit of the applicant, or of another person, acquainted with the facts.

3. Under subdivision tenth thereof, where the applicant is an officer or member of a fire company, the certificate of the foreman, or other chief officer, of the company, to which the applicant belongs, dated within three months of the time of presenting it.

4. Under any other subdivision thereof, an affidavit of the applicant; or an affidavit, satisfactory to the commissioner, of another person in his behalf, stating the facts, entitling the applicant to exemption.

Each certificate, specified in this section, must be accompanied with satisfactory proof, by affidavit, of the genuineness of the signature thereto; and each affidavit and certificate must be filed with the commissioner of jurors, and must be kept open by him, at all reasonable times, to public inspection.

Length of jury service re-

§ 1129. A person shall not be required to serve, as a trial juror, more than six days, at any term, for which his name is drawn, as prescribed

in this article, unless the court, for good cause, otherwise specially directs; except that he shall not be discharged, until the close of a trial, in which he is serving, at the time when the six days expire. A person shall not be required to serve, as a trial juror, except by the special order of the judge presiding at or holding the term, or as otherwise specially prescribed in this article, unless at least three days' previous notice to attend has been served upon him, as prescribed in section one thousand one hundred and forty-six of this act.

quired. Notice to juror to attend.

§ 1130. The judge presiding at, or holding a term, may, in his discretion, excuse a trial juror, attending thereat, from service, during the whole or a portion of that term, in either of the following cases:

When court to excuse juror from service.

1. Where he has actually served as a trial juror, in a court of record in the county, within six months before the commencement of the term, and since the second Monday of August, preceding the commencement thereof.

2. Where he has actually served in the county, as a grand juror, pursuant to law, since the first Monday of September, preceding the commencement of the term.

3. Where the interests of the public, or of the juror, will be materially injured by his attendance; or his own health, or the health of a member of his family, requires his absence; or his wife, or a near relative of himself or his wife, has recently died.

§ 1131. The clerk of each court of record in the county of Kings, must, within one week after the close of each term, for which trial jurors have been drawn, or after the discharge of the trial jurors, if they are discharged before the close of the term, return to the commissioner of jurors, the panel of trial jurors, with the sheriff's return, received from the sheriff, as prescribed in section one thousand one hundred and forty-eight of this act, or a copy of each of those papers, certified by the clerk. The clerk must also deliver to the commissioner therewith, a certificate, specifying, distinctly and in detail, as follows:

Clerk of court to certify to commissioner, as to attendance, excuses, fines, etc., of jurors.

1. The name and residence of each juror, who attended and served; and the number of days he actually served.

2. The name and residence of each juror, who was excused or discharged; with reason therefor.

3. The name and residence of each person notified, who did not attend or serve.

4. The name and residence of each person fined, and the date and amount of his fine.

The return and certificate must be filed in the office of the commissioner, who must also record therefrom, upon the list originally made by him, the date and amount of service, performed by each person, as therein set forth.

§ 1132. Trial jurors must be selected by the commissioner of jurors, who may decide upon their qualifications, and exemptions, as prescribed in this article. The commissioner may, from time to time, appoint, and at pleasure remove, one assistant, and as many more assistants, clerks, and messengers, as the board of supervisors directs. The commissioner, and each assistant, whom he designates for the purpose, by a certificate, filed in the office of the county clerk, may administer an oath or affirmation, in relation to any matter, embraced within the provisions of this article. The commissioner must keep a record of all proceedings before him, or in his office.

Commissioner of jurors to select trial jurors; his general powers.

§ 1133. The commissioner is entitled to, and must collect, for a copy of a paper furnished by him, the same fees as the clerk of a court of

Id.; to receive fees and fines

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for benefit of county.

record. He must furnish a copy of each paper filed, or proceeding taken, in his office, to any person applying therefor, and paying the fees. All the money received by him, for fees, or fines collected from trial jurors, or otherwise in the discharge of his duties as commissioner, must be accounted for by him, and paid into the treasury of the county.

Supervisors to provide for his expenses, etc.

§ 1134. The board of supervisors of the county must provide suitable rooms, and other accommodations, for the use of the commissioner of jurors, and also for the compensation of his assistants, clerks, and messengers; and for necessary printing and advertising, books, stationery and other articles, required for the convenient discharge of his duties.

Assessors to return persons liable, and commissioner to select jurors.

§ 1135. The assessors in the city of Brooklyn, and of each town in the county of Kings, or a majority of them, must, after the first day of May, and on or before the first day of July, in each year, return, to the commissioner of jurors, a written list, under his or their hands, containing the names of all persons in the city or town, as the case may be, who are liable to serve as trial jurors; and stating the occupation, place of business, and residence, of each person, as far as those particulars can be conveniently ascertained. The omission to include the names of one or more persons, so liable, or any other error or defect in a list, does not affect the validity of any proceeding, prescribed in this article. The commissioner must, within the same period, select, from the persons residing in the county, suitable persons to serve as trial jurors. In making the returns or selection, the assessors and the commissioner respectively must take the names of those persons only, whom they believe to be qualified to serve, and not exempt from service, as trial jurors. A list of the names so selected must be made, by the commissioner, in a book, specifying, as nearly as he has ascertained the facts, the occupation, the place of business, and the residence of each person, including the town, or, in the city of Brooklyn, the ward. In the list, the towns must be arranged alphabetically, and the wards numerically; and the names of the jurors must be arranged alphabetically, according to their surnames, each under the name of the town or ward, where he resides.

When commissioner to publish notice, and receive evidence of exemption.

§ 1136. As soon after the first day of June, in each year, as the commissioner has made the list, he must publish a notice, for at least ten days, in at least six daily newspapers, published in the county, to the effect, that the list of trial jurors for the year is ready, at his office, for examination and correction. He must then receive evidence of disqualifications or exemptions, and must mark "not qualified", or "exempt", in the list, opposite the name of each person, found to be disqualified to serve, or exempt from serving as a trial juror, as the case requires. He must also record therein, the ground of each disqualification or exemption.

Commissioner to prepare list, and file transcript.

§ 1137. On the first Monday of August in each year, or earlier, if the corrections can be earlier made, the commissioner must prepare the list of trial jurors for the year, by copying, from his book, the names of all persons, who appear therein to be liable to serve as trial jurors, with the proper additions of each. The commissioner must file a transcript of the list, verified by his affidavit, in the office of the county clerk.

Supplemental lists may be afterwards made.

§ 1138. Supplemental lists, containing the names and proper additions of persons, subsequently ascertained to be liable to serve as trial jurors, may, from time to time thereafter be made; and transcripts thereof, verified as prescribed in the last section, must be filed in like manner, by the commissioner. Ballots, containing those names, must be prepared, as prescribed in the next section, and used, in like man-

ner as the other ballots therein specified, for the residue of the jury year.

Ballots to be prepared, and deposited in box.

§ 1139. The commissioner must prepare ballots, by writing the names, contained in the list, a transcript of which was filed in the office of the county clerk, with the proper additions of each person, on separate pieces of paper, which must be uniform, as nearly as may be, in appearance. On the second Monday of August in each year, he must deposit the ballots, in the box kept by him for that purpose, and must place his seal upon the box; whereupon all jury ballots, previously in use, must be destroyed. The box must be constructed with an aperture, large enough only to conveniently admit the hand of the person, by whom the ballots are to be drawn; and the aperture must be provided with a cover, so arranged as to be conveniently sealed, when closed.

What officers to attend drawing; how many jurors to be drawn.

§ 1140. The commissioner must seasonably notify the justices of the supreme court, residing in the county, the judges of the city court of Brooklyn, the county judge, and the justices of sessions of the county, to attend, at his office, on a day designated by him, not less than fourteen nor more than twenty days, before the day appointed for holding a term of a court of record in the county, at which issues of fact are triable by jury, in order to witness and assist in the drawing of trial jurors, for that term. The number of trial jurors, to be drawn for each term, may be fixed by the judge who is to preside at or hold the term, by an order under his hand, delivered to the commissioner. If the number has not been so fixed, at the time of the drawing, one hundred and thirty-two trial jurors must be drawn for the term.

Proceedings preliminary to the drawing.

§ 1141. If two or more of the judges, specified in the last section, attend with or without one or more justices of sessions, the commissioner must break the seal of the box containing the ballots, open it, and exhibit the ballots for their inspection; together with his original and each supplemental list of trial jurors, and also the verified transcripts thereof, filed in the county clerk's office. The ballots, containing the names of trial jurors, excused from service for the whole or a portion of a previous term of a court of record in the county, which have not already been replaced in the box, to be redrawn, must then be replaced therein; and the judges attending the drawing, must take care, when the seal is broken, that they are so replaced. If a supplemental list has been made, and a transcript filed since the last drawing, ballots, containing the names appearing therein must, at the same time, be placed in the box. The judges and the commissioner, or a majority of them, must appoint one of the attending officers to draw the ballots from the box, and another to checkmark the drawing as it proceeds, upon a copy of the lists, transcripts of which have been filed with the county clerk.

Drawing; how conducted.

§ 1142. The commissioner must then shake the box containing the ballots, so as thoroughly to mix them. The person, appointed for that purpose, must then, without seeing the name contained in any ballot, publicly draw one ballot from the box, and read aloud the contents thereof. If the drawing is for trial jurors, to serve in the city court of Brooklyn, and the person drawn does not reside in that city, the ballot must be returned to the box; but if he resides in that city, or if the drawing is for trial jurors, to serve in another court, the person appointed to checkmark the drawing, must place, opposite the name of the person drawn, upon the copy of the lists, the figure one. The

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ballot must then be deposited in a second box, provided for that purpose, and constructed like the first box. Another ballot must then be drawn, in like manner, from the first box: and the same process must be repeated, until the requisite number has been drawn; except that each name must be checkmarked in its numerical order.

Certificate to be made, and boxes sealed up.

§ 1143. When the drawing is completed, the commissioner, and the judges by whom it was conducted, must sign a minute, at the end of the copy of the lists, upon which the checkmarks have been made, setting forth that the trial jurors, whose names are contained therein, were duly drawn by them, for the court and the term therein specified, in the order denoted by the figures. The judges must then close each box; and place upon the cover thereof, their seals, which must not be broken, except when necessary for a subsequent drawing.

Subsequent drawings; how conducted.

§ 1144. The proceedings, upon each subsequent drawing, are the same; but the list, must be checkmarked with numbers, commencing with the number next in order, after the last number used at the preceding drawing.

Proceedings when first box exhausted.

§ 1145. After all the ballots have been drawn from the first box, and deposited in the second box, the commissioner must make a new list, by copying the lists used upon the preceding drawings, omitting the checkmarks. He must then correct it, by properly indicating each person who has been found to be disqualified, exempt, dead, or not resident within the county; and each person, who has been excused, and for what time. Thereafter, when trial jurors are drawn, the ballots must be drawn from the second box; the names must be checkmarked on the corrected list; and the ballots not used must be deposited in the first box; except that where a ballot is drawn, containing the name of a person indicated, on the corrected list, as disqualified, exempt, dead, or non-resident, it must be destroyed; and a ballot, containing the name of a person who has been excused, for a period then unexpired, must be returned to the box from which it was drawn, without checkmarking.

Commissioner to transmit panel to sheriff; sheriff to notify jurors.

§ 1146. Immediately after each drawing of trial jurors, the commissioner must prepare a panel, verified by his affidavit, containing the names of the jurors drawn, with the proper additions of each, and stating for what court and for what term, they were drawn. He must transmit the panel to the sheriff of the county, who must keep it on file, in his office, for public inspection. The sheriff must forthwith notify each juror named therein, to attend the term for which he was drawn, by serving upon him a notice to that effect, addressed to him. The notice may be served personally, or by leaving it at the juror's residence, or usual place of business, with a person of proper age and discretion. It must specify the days, during which the juror is required to be present; and it may contain copies of such portions of this article, as the sheriff deems proper.

Days for which the jurors are to be notified. Excusing jurors, and changing days of their attendance.

§ 1147. The thirty-six trial jurors, first drawn for a term, or such other number as the judge, appointed to hold or preside at the term, directs, must be notified to be present, during the first six days of the term; and the thirty-six trial jurors next drawn, or such other number as the judge directs, must be notified to be present, during the next six days of the term; and a like number during each succeeding six days. The judge, holding or presiding at the term, may, in his discretion, on the application of a trial juror, excuse him, from the whole or a part of the time of service, required of him. The judge may also change the time of service of a juror to a later day, during the same, or a sub-

erm of the court. Each juror, whose time of service is changed certain, must attend, at the opening of court on that day, and r until discharged, without further notice. If he fails so to do, le to the same punishment, as if he had been personally notie sheriff, to attend the term, and to be present on that day. t of the court must enter in a book, kept for that purpose, the each juror, who is so excused, or whose time of service is

Sheriff to make return of jurors notified.

. Before the commencement of each term of a court, for which rs have been drawn, as prescribed in this article, the sheriff , with the clerk, the panel, or a copy of the panel, with a nder his hand, indorsed thereupon, or annexed thereto, showname and additions of each juror notified, the days during was notified to attend, and the manner in which he was

Court may at any time order a new panel. How drawn

. At any time during the sitting of a term of a court of record ounty, the court may direct an additional number of trial be drawn for that term. The order must specify the number awn, and the time of drawing. The drawing must be con- s prescribed in sections eleven hundred and forty-one, eleven and forty-two, and eleven hundred and forty-three of this act, at notice is not required. The sheriff must forthwith notify r drawn, by such a notice as the court directs, to attend the the time specified in the order.

Jurors in certain special proceedings

. In a special proceeding, pending before the county judge of ounty, in which a trial jury is necessary, the judge may a jury, from the trial jurors, who are serving, at the time, in t of sessions of the county. In a special proceeding, pending judge of the city court of Brooklyn, in which a trial jury is , the judge may empanel a jury, from the trial jurors, who ing, at the time, in that court. If there are no jurors serving urt of sessions, or in the city court, as the case may be, the ay make an order, requiring the commissioner of jurors to number of trial jurors, designated therein; whereupon the ioner must draw the requisite number, and the sheriff must em, as prescribed in this article, for drawing and notifying al jurors.

Compensation to judges, etc., for services under this article.

. The board of supervisors of the county must allow to each ncluding each justice of the supreme court, for the services d by him, as prescribed in this article, such compensation, as d deems reasonable and proper.

Court of record to fine juror for non-attendance.

. Where a person, duly drawn and notified to attend a term of f record, as a trial juror, fails to attend, at the time specified otice, or from day to day, the court, at that term, must impose n a fine of twenty-five dollars, for each day that he fails so to This section applies to a special juror, as well as to an ordial juror.

Juror may also be arrested, and compelled to serve.

. Where a person, duly drawn and notified, fails to attend and a term of a court of record, as required by law, without hav- excused, the court, besides imposing a fine, as prescribed in section, may direct the sheriff to arrest him, and bring him the court; and, when he has been so brought, it may, in its on, compel him to serve.

Commissioner to notify ju-

. The commissioner of jurors must cause a notice to be served ch delinquent trial juror, returned as having been fined, stating

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rors fined to appear; board for remission and enforcement of fines.

the sum in which, and the term at which he was fined, and r
him to show cause, if he has any, before the board, specifie
section, at the commissioner's office, on a day, not less than th
thereafter, and at an hour specified in the notice, why the fin
be remitted. The commissioner must notify the justices of the
court, residing in the county, the county judge, and the chief-
the city court of Brooklyn, to attend at the same time and pl
act with him as a board, for the remission and enforcement
fines. It is their duty to attend, and act accordingly. The
sioner, and two of those justices or judges, constitute a quorum
board may, in its discretion, hear testimony; and it may, from
time, adjourn the meeting, or the hearing or final disposition
ticular case. It may remit the whole or any part of a fine; b
shall not be remitted or reduced, unless the person, upon who
been imposed, or, if a reason satisfactory to the board is given,
affidavit cannot be furnished, another person in his behalf, ma
files with the commissioner, an affidavit, stating the groun
which a remission or reduction is claimed. Each affidavit,
must be kept open to public inspection.

Commissioner to collect fines, and to make return of unpaid fines; precept thereupon.

§ 1155. The commissioner of jurors must receive each fine,
collected, as prescribed in this article. When ten days have
since the final disposition of a case by the board, the comm
must file, in the office of the clerk of the court, a return, contai
name of each juror fined, whose fine remains unpaid, and a st
of the sum remaining unpaid. The clerk must thereupon issu
commissioner, a precept, under the seal of the court, specify
name of each person fined, and the amount of his fine re
unpaid; and commanding the commissioner to levy and enfor
tion of each fine, and to return the precept, with his doings th
within ninety days after the receipt thereof. For the purpos
lecting a fine, the commissioner must levy upon and sell the
property of a person fined, with like effect, and subject to the s
visions of law, as where a sheriff levies upon and sells personal p
by virtue of an execution, issued upon a judgment of a court o

Fines, not collected under precept, to be docketed and enforced as judgments.

§ 1156. The commissioner must return the precept, accordi
command, to the clerk of the court issuing it. If he fails so t
court may enforce the return, by attachment for contempt. W
precept is returned, the clerk must make, in the docket of ju
kept by him, the same entries, as nearly as may be, with re
each uncollected fine, as if it was a final judgment, rendere
action. If the fine was imposed at a term of the city court o
lyn, the clerk thereof must immediately transmit a transcri
entries, to the clerk of the county of Kings; who must file
make the appropriate entries in his docket of judgments. W
entries have been made, the fine, with interest, becomes a li
the real property of the person fined, as if it was recovered by
ment in the same court; and an execution to collect it may be
directed to the sheriff of the county of Kings, as upon a ju
The commissioner has, in relation to the execution, and the sat
of the fine, all the powers of the attorney for a party recover
a judgment, in relation to the judgment, and the executio
thereupon.

When lien discharged.

§ 1157. The lien, created by such a docket, must be discha
the county clerk, on filing with him the commissioner's certi
payment.

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§ 1158. If the commissioner of jurors, or either of his assistants, or clerk or other person, employed by him, corruptly and without sufficient cause, omits the name of a person, duly drawn, from a panel of trial jurors, or the ballot, containing the name of such a person, from either of the boxes prescribed in this article; or, directly or indirectly, receives a fee, reward, compensation, or advantage, in consideration for or as an inducement to such an omission; he is guilty of a felony, and shall, on conviction, be punished by imprisonment in a State prison, for a term not less than two, nor more than five years.

Commissioner, etc., corruptly omitting name, is guilty of felony.

§ 1159. A wilful omission, by the commissioner, of a duty required of him by this article, other than that specified in the last section, is a misdemeanor.

Commissioner's other wilful neglect, a misdemeanor.

§ 1160. A person, to whom application is made, within the county of Kings, by an assessor, or by the commissioner of jurors, or either of his assistants, for information, as to a fact, upon which the liability of himself, or any other person, to serve as a trial juror, depends, and who refuses to give information relating thereto, which he can give, or who wilfully gives false information relating thereto; or a person who wilfully makes to an assessor, or to the commissioner of jurors, or a person acting by his authority, a false representation as to the identity, residence, or any other matter, relating to a juror, duly drawn, and selected on a panel to be notified; or who knowingly retains, conceals, suppresses, or wilfully destroys, a notice to attend, left at the residence or place of business of another, who has been drawn as trial juror, is guilty of a misdemeanor.

Giving false information, or suppressing notice, a misdemeanor.

§ 1161. A physician, who knowingly gives a false certificate, or makes a false representation, for the purpose of enabling or assisting a person, to be discharged, excused, or exempted from service, as a trial juror in the county of Kings, is guilty of a misdemeanor.

Penalty for physician giving false certificate.

§ 1162. The commissioner of jurors must make a yearly report to the board of supervisors, of all proceedings had before him, or by him, in the discharge of his duties; and he must pay over to the county treasurer, at least once in each three months, all money in his hands, which he has received as commissioner.

Commissioner to report and pay over money.

TITLE V.

Trial by jury

ARTICLE 1. Formation of the jury.
2. The verdict.

ARTICLE FIRST.

FORMATION OF THE JURY.

SECTION 1163. Clerk to prepare ballots of jurors for trial.
1164. Clerk to draw ballots.
1165. Mode of drawing ballots.
1166. Persons drawn, etc., to form the jury.
1167. Ballots drawn, when to be deposited in a second box.
1168. Id.; when to be returned to the first box.

1169. Ballots of absentees, etc., to be returned to first box.
1170. New jury may be drawn while first is empanelled.
1171. When talesmen to be procured, or jurors drawn from thi
1172. When talesmen to be procured.
1173. If sheriff is a party, court may appoint a person to act fo
1174. Duty of sheriff and of talesmen.
1175. Jury competent, although containing none of original pa
1176. Two peremptory challenges in a civil action.
1177. No challenge allowed because officer drawing is a party,
1178. No challenge allowed because officer notifying is a party
1179. Challenges in penal actions.
1180. Challenges how tried. Exceptions to and review of the
tion of the court, in reference thereto.

Clerk to prepare ballots of jurors for trial.

§ 1163. At the opening of a term of a court of record at whi of fact are to be tried by jury, the clerk must cause ballots, as nearly as may be, in appearance, to be prepared, by wr name of each person, returned to the term as a trial juror, proper additions, on a separate piece of paper. He must fold each ballot, in the same manner, as nearly as may be, resemble the others, and so that the name is not visible. Tl must be deposited in a sufficient box, from which they must b as prescribed in this article.

Clerk to draw ballots.

§ 1164. When an issue of fact, to be tried by a jury, is b trial, the clerk, under the direction of the court, must ope out of the box, as many of the ballots, one after another, as cient to form a jury.

Mode of drawing ballots.

§ 1165. Before the first ballot is drawn, the box must be c well shaken, so as thoroughly to mix the ballots; and the cl draw each ballot, without seeing the name written on any through an aperture, made in the lid of the box, large enc to admit his hand conveniently.

Persons drawn, etc., to form the jury.

§ 1166. The first twelve persons who appear, as their n drawn and called, and are approved as indifferent between th and not discharged or excused, must be sworn; and constitute to try the issue.

Ballots drawn, when to be deposited in a second box.

§ 1167. The ballots, containing the names of the jurors must be then deposited in another box, and there kept, apart other ballots, until that jury is discharged.

Id.; when to be returned to the first box.

§ 1168. After that jury is discharged, the ballots contain names must be again rolled up or folded, as prescribed in secti hundred and sixty-three of this act, and returned to the box, fr they were first taken; and the same course must be pursued as an issue is brought to trial by a jury.

Ballots of absentees, etc., to be returned to first box.

§ 1169. The ballot, containing the name of a juror, who i when his name is drawn or called, or is set aside, or excused f ing on that trial, must be again rolled up or folded, in the sam as before, and returned to the box, containing the undrawn b soon as the jury is sworn.

New jury may be drawn while first is empanelled.

§ 1170. If an issue is brought to trial by a jury, while empanelled in another cause, at the same term, and not then di the court may order a jury, for the trial of that issue, to be d of the box containing the ballots then undrawn; but, in any o the ballots, containing the names of all the trial jurors, ret and attending the term, must be placed together in the s before a jury is drawn therefrom.

When talesmen *to be procured, or jurors*

§ 1171. If a sufficient number of jurors, duly drawn and do not attend, or cannot be obtained, to form a trial jury, t *may, in* any county except Westchester, direct the sheriff t *the attendance* of such a number of talesmen, from the bysta

from the county at large, qualified to serve as trial jurors, as it deems sufficient for the purpose. In Westchester county, the court must direct the sheriff to draw a sufficient number of ballots from the first box, specified in section ten hundred and thirty-eight of this act if there is not a sufficient number of ballots remaining therein, to draw the residue from the second box, specified in section ten hundred and fifty-one of this act. In any other county, except New-York and Kings, it may, in its discretion, instead of directing him to require talesmen to attend, direct him to draw a sufficient number of ballots from the third box, specified in section ten hundred and fifty-two of this act. In either case, the sheriff must notify the persons thus drawn to attend forthwith, or upon a day fixed by the court. If, for any reason a sufficient number of jurors to try the issue is not obtained, from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained; and in making each order, the court may exercise the same discretion, as in making the first order.

drawn from third box.

§ 1172. In any county, except New-York, Kings, or Westchester, the court may also direct the sheriff to require the attendance of such a number of qualified talesmen, for the trial of an issue of fact, as it deems sufficient, where, by reason of one or more juries being empanelled, or for any other reason, no ballot remains undrawn; or where, in consequence of jurors being set aside, a juror cannot be obtained, for the trial of that issue, from the list of those returned.

When talesmen to be procured.

§ 1173. If, in a case specified in the last two sections, the sheriff is a party to the issue, the court must appoint a disinterested person, to act in place of the sheriff. For that purpose, the person so appointed possesses all the powers, and is subject to all the duties and liabilities of the sheriff, with respect to the matters specified in those sections.

If sheriff is a party court may appoint a person to act for him

§ 1174. The sheriff, or person appointed by the court, must notify the requisite number of persons to attend, and make return thereof, as prescribed in section ten hundred and forty-eight of this act; except that each person must be required to attend forthwith. Each person so notified must attend forthwith, and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined, in the same manner as a trial juror, regularly drawn and notified, as prescribed in this chapter; and he is subject to the same exceptions and challenges, as any other trial juror.

Duty of sheriff and of talesmen.

§ 1175. It is not a valid objection to a jury, procured as prescribed in the last four sections, that it contains none of the jurors originally returned to the term, or is only patially composed of such jurors.

Jury competent, although containing only part or none of original panel.

§ 1176. Upon the trial of an issue of fact, joined in a civil action, in a court of record, or not of record, each party may peremptorily challenge not more than two of the persons, drawn as jurors for the trial.

Two peremptory challenges in a civil action.

§ 1177. It is not a good cause of challenge, to the panel or array of trial jurors, in an action in a court of record, that the officer who drew them is a party to, or interested in the action, or counsel or attorney for, or related to, a party.

No challenge allowed because officer drawing is a party, etc.

§ 1178. It is not a good cause of challenge to the panel or array of trial jurors, in an action in a court of record, that they were notified to attend by an officer, who is a party to, or interested in, the action, or related to a party; unless it is alleged in the challenge, and is established, that one or more of the jurors drawn were not notified, and that the omission was intentional.

No challenge allowed because officer notifying is a party, etc.

§ 1179. In a penal action, in a court of record, or not of record, to recover a sum of money, it is not a good cause of challenge to a trial juror, or to an officer who notified the trial jurors, that the juror or the

Challenges in penal actions.

TITLE 5.

officer is liable to pay taxes, in a city, town, or county, which may b benefited by the recovery.

Challenges how tried. Exceptions to and review of the determination of the court, in reference thereto.

§ 1180. An objection to the qualifications of a juror is available only upon a challenge. A challenge of a juror, or a challenge to the panel or array of jurors, must be tried and determined by the court only. Either party may except to the determination, and it may be reviewed upon a question of fact, or a question of law, or both, as where an issue of fact presented by the pleadings is tried by the court; except that where one or more exceptions are taken, to the rulings of the court, made after the jury is empanelled, an exception to the determination of a challenge must be heard at the same time; and the case must contain the matters necessary to present it, upon the facts, or the law, or both.

ARTICLE SECOND.

The Verdict.

Section 1181. Discharge of jury failing to agree.
1182. Plaintiff cannot submit to nonsuit after jury retires.
1183. In action to recover money, jury to assess damages.
1184. How double, treble, or increased damages, found and awarded.
1185. When verdict to be taken, subject to the opinion of the court.
1186. General and special verdict defined.
1187. General or special verdict, when rendered; special finding with general verdict.
1188. Special finding controls general verdict.
1189. Entry of verdict; subsequent proceedings.

Discharge of jury failing to agree.

§ 1181. Where a jury is empanelled to try an issue, to make an inquiry, or to assess damages, in an action in a court of record, or not of record, or in a special proceeding before an officer, if the jurors cannot agree, after being kept together, for such a time as is deemed reasonable, by the court before which, or the officer before whom, they were empanelled, the court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case requires; and the same proceedings must be had before the new jury as if it was the jury first empanelled.

Plaintiff cannot submit to nonsuit after jury retires.

§ 1182. It is not necessary, in an action in a court of record, to cal the plaintiff, when the jurors are about to deliver their verdict; and the plaintiff, in such an action, cannot submit to a nonsuit, after the cause has been committed to the jury, to consider of the verdict.

In action to recover money, jury to assess damages.

§ 1183. In an action to recover a sum of money only, if a verdict is found, either in favor of the plaintiff, or in favor of a defendant, who has set up a counterclaim for a sum of money, the jury must assess the amount of damages. The jury may also, under the direction of the court, assess the amount of the damages, where the court directs judgment for the plaintiff, on the pleadings.

How double, treble or increased damages found and awarded.

§ 1184. Where double, treble or other increased damages are given by statute, single damages only are to be found by the jury, except in a case where the statute prescribes a different rule. The sum so found must be increased by the court, and judgment rendered accordingly.

When verdict to be taken, subject to the opinion of the court.

§ 1185. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may, at the same term, set aside the verdict, and direct judgment to be entered on either party, with like effect and in like manner, as if such a direction had been given at the trial. An exception to such a direction may be taken as prescribed in section nine hundred and ninety-four of this

General and special verdict defined.

§ 1186. A general verdict is one, by which the jury pronounces, generally, upon all or any of the issues, in favor either of the plaintiff, or of the defendant. A special verdict is one, by which the jury finds the facts only, leaving the court to determine, which party is entitled to judgment thereupon.

General or special verdict, when rendered; special finding with general ver dict.

§ 1187. In an action to recover a sum of money only, or real property, or a chattel, the jury may render a general or a special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict, upon all or any of the issues. Where the jury finds a general verdict, the court may instruct it to find also specially, upon one or more questions of fact, stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk, and entered in the minutes.

Special finding controls general verdict.

§ 1188. Where a special finding is inconsistent with a general verdict, the former controls the latter, and the court must render judgment accordingly.

Entry of verdict; subsequent proceedings.

§ 1189. When the jury renders a verdict, or finds upon one or more specific questions of fact, stated under the direction of the court, the clerk must make an entry in his minutes, specifying the time and place of the trial; the names of the jurors and witnesses; the verdict, or the questions and findings thereupon, as the case requires; and the direction, if any, which the court gives, with respect to the subsequent proceedings. Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment, in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law.

TITLE VI.

Miscellaneous provisions, including those relating to embracery, and other acts of misconduct.

SECTION 1190. Trials by jury to be as herein provided; juries of part aliens abolished.
1191. Venire not necessary.
1192. Jurors not to be questioned for their verdict.
1193. Penalty where juror takes gift, etc.
1194. Embracery; penalty therefor.
1195. Penalty for juror's non-attendance in special proceeding.
1196. Sheriff, etc., to keep jury in special proceeding; penalty.
1197. Notice of imposition of fine.
1198. Special return of delinquency and fine to county court.
1199. Collection or remission of fine.

Trials by jury to be as herein provided; juries of part aliens abolished.

§ 1190. A trial by a jury, of an issue of fact, joined in a civil action, in a court of record, must be had, as prescribed in this chapter; except in a case where it is otherwise specially prescribed by law. An alien is not entitled to a jury, composed in part of aliens or strangers, in an action or special proceeding, civil or criminal.

Venire not necessary.

1191. A venire to procure jurors cannot be issued in a civil action, except in a court of record, except as specially prescribed by law.

TITLE 6.

Jurors not to be questioned for their verdict.

§ 1192. A juror shall not be questioned, and is not subject to an action, or other liability, civil or criminal, for a verdict rendered by him, in an action in a court of record, or not of record, or in a special proceeding before an officer, except by indictment, for corrupt conduct, in a case prescribed by law.

Penalty where juror takes gift, etc.

§ 1193. A person, drawn or notified to attend, as a trial juror, in an action in a court of record, or not of record, or in a special proceeding before an officer, who takes any thing to render his verdict, or receives, from a party to the action or special proceeding, a gift or gratuity, forfeits ten times the sum, or ten times the value of that, which he took or received, to the party to the action or special proceeding, aggrieved thereby; and is also liable to that party, for his damages sustained thereby; besides being subject to the punishment, prescribed by law.

Embracery; penalty therefor.

§ 1194. An embraceor, who procures a person, drawn or notified to attend, as a trial juror, to take gain or profit, contrary to the last section, forfeits ten times the sum, or ten times the value of that, which was so taken, to the party aggrieved thereby; and is also liable to that party for his damages sustained thereby; besides being subject to the punishment, prescribed by law.

Penalty for juror's non-attendance in special proceeding.

§ 1195. A person, who has been lawfully and personally notified to attend, as a trial juror, to inquire into a matter or thing, or to hear and try a controversy, in a special proceeding, pending before a judge, justice of the peace, commissioner, or other officer, and who wilfully neglects to attend, as required by the notice, may be fined by the officer, in a sum not exceeding twenty-five dollars. But this section does not extend to a case, where special provision is made by law, for punishing the default of a trial juror.

Sheriff, etc., to keep jury in special proceeding; penalty.

§ 1196. A sheriff, constable, or other officer, who notified jurors to attend, in a case specified in the last section, must, when directed by the officer, before whom the special proceeding is pending, attend, and take charge of the jury. For a wilful neglect to obey such a direction, or for any misconduct, while attending the jury, by which a right or remedy of a party to the special proceeding may be impaired or prejudiced, he must be fined, by that officer, in a sum not exceeding twenty-five dollars.

Notice of imposition of fine.

§ 1197. Where a fine is imposed, in a case specified in the last two sections, written notice thereof must be served upon the person fined, to the end that he may apply to the officer imposing it, for the remission of the whole or a part thereof, upon proof that he had a reasonable excuse for his neglect or misconduct, or that other good cause exists for the remission.

Special return of delinquency and fine to county court.

§ 1198. If, within thirty days after the service of the notice, the fine has not been remitted by the officer imposing it, he must make a special return of the delinquency or misconduct, for which the fine was imposed, and of the amount of the fine, accompanied with proof, by affidavit, of service of the notice specified in the last section, to the next term of the county court of the county, in which the delinquent resides.

Collection or remission of fine.

§ 1199. The county clerk must deliver to the district-attorney, a copy of the return and of the affidavit, at the time when he delivers to him copies of the minutes of fines, imposed by the county court. The fine must be collected, or it may be remitted or reduced, in the same manner as a fine imposed by the county court, upon a defaulting trial juror.

CHAPTER XI.

JUDGMENTS.

LE I.—JUDGMENT IN AN ACTION.
LE II.—JUDGMENTS TAKEN WITHOUT PROCESS.
LE III.—VACATING OR SETTING ASIDE A JUDGMENT, FOR IRREGULARITY OR ERROR IN FACT.

TITLE I.

Judgment in an action.

LE 1. General provisions.
2. Mode of taking, entering, and enforcing a judgment.
3. Docketing a judgment; effect thereof, as a lien upon real property; suspending and discharging the lien; satisfaction and assignment of a judgment.

ARTICLE FIRST.

GENERAL PROVISIONS.

ION 1200. Definition of final judgment.
*1201. Definition of interlocutory judgment.
1202. When judgment may be entered.
1203. Judgment to be entered at a term held by one judge.
1204. Judgment may be for or against any of the parties.
1205. When a several judgment may be taken.
1206. Judgment for or against a married woman.
1207. When judgment for plaintiff not to exceed judgment demanded.
1208. Rate of damages.
1209. Effect of judgment dismissing the complaint.
1210. Judgment against a dead person.
1211. Judgment to bear interest.

§ 1200. A judgment is either interlocutory, or the final determination of the rights of the parties in the action. Definition of final judgment.

§ 1202. Judgment may be entered in term or vacation.

§ 1203. Judgment must be entered, in the first instance, pursuant to the direction of the court, at a term held by one judge; except where special provision is otherwise made by law. Judgment to be entered at a term held by one judge.

* Stricken out.

TITLE I.

Judgment may be for or against any of the parties.

§ 1204. Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side, as between themselves; and it may grant, to a defendant, any affirmative relief, to which he is entitled.

When a several judgment may be taken.

§ 1205. Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment, against one or more of the defendants; and direct that the action be severed, and proceed against the others, as the only defendants therein.

Judgment for or against a married woman.

§ 1206. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single.

When judgment for plaintiff not to exceed judgment demanded.

§ 1207. Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue.

Rate of damages.

§ 1208. Where either party is entitled to recover damages, he may recover any rate of damages, which he might have heretofore recovered, for the same cause of action.

Effect of judgment dismissing the complaint.

§ 1209. A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits.

Judgment against a dead person.

§ 1210. Where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken, by special provision of law, a memorandum of the party's death must be entered, with the judgment, in the judgment-book, indorsed on the judgment-roll, and noted on the margin of the docket of the judgment. Such a judgment does not become a lien upon the real property, or chattels real, of the decedent; but it establishes a debt, to be paid in the course of administration.

Judgment to bear interest.

§ 1211. A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it is entered. But where a judgment directs that money paid out shall be refunded or repaid, the direction includes interest from the time when the money was paid, unless the contrary is expressed.

ARTICLE SECOND.

MODE OF TAKING, ENTERING, AND ENFORCING A JUDGMENT.

SECTION 1212. Judgment by default, in certain actions on contract; how taken.
1213. Amount of judgment in such cases; how determined.
1214. Application to court for judgment by default; when necessary.
1215. Proceedings on such an application.
1216. Application for judgment, in case of service by publication.
1217. Attachment and undertaking for restitution, required in certain actions.
1218. When judgment cannot be taken against infant
1219. When a defendant in default is entitled to notice.
1220. When action may be severed, if issues of law and issues of fact presented.
1221. Judgment how taken, after trial of issues of law and issues of fact, in the same action.

1222. Id.; after trial of issue of law only.
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1224. Id.; upon interlocutory judgment, affirmed on appeal to the general term.
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1229. In matrimonial causes, judgment can be rendered only by the court.
1230. Final judgment upon decision or report awarding interlocutory judgment, etc.
1231. Id.; how final judgment entered and settled in certain cases.
1232. Interlocutory reference or inquisition; how reviewed.
1233. Motion for judgment upon a special verdict, etc.
1234. Id.; upon verdict subject to opinion of court.
1235. Interest on verdict, etc., to be included in recovery.
1236. Clerk to keep judgment-book; judgment to be entered therein.
1237. Judgment-roll to be filed; of what it consists.
1238. Id.; by whom prepared.
1239. Time of filing judgment-roll to be noted.
1240. When a judgment may be enforced by execution.
1241. When a judgment may be enforced by punishment for disobeying it.
1242. Real property; how sold. Effect of conveyance.
1243. Security upon sale by referee.
1244. Conveyance to state name of party.

§ 1212. In an action specified in section four hundred and twenty of this act, where the summons was personally served upon the defendant, and a copy of the complaint, or a notice stating the sum of money for which judgment will be taken, was served with the summons; or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice, and also proof, by affidavit, that the defendant has not appeared; whereupon the clerk must enter final judgment in his favor.

2. If the defendant has seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons and of the appearance, or of the appearance only, and also proof, by affidavit, of the default; whereupon the clerk must enter final judgment in his favor.

If the defendant has made default in appearing or pleading, and the case is not one where the clerk can enter final judgment, as prescribed in either of the foregoing subdivisions of this section, the plaintiff must apply to the court for judgment, as prescribed in section twelve hundred and fourteen of this act.

§ 1213. Where final judgment may be entered by the clerk, as prescribed in the last section, the amount thereof must be determined as follows:

Amount of judgment in such cases; how determined.

1. If the complaint is verified, the judgment must be entered for the sum, for which the complaint demands judgment; or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary it may be made by the clerk,

2. If the complaint is not verified, the clerk must assess the amount

due to the plaintiff, by computing the sum due upon an instrument for the payment of money only, the non-payment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action, stated in the complaint. If an instrument, specified in this subdivision, has been lost, so that it cannot be produced to the clerk, he must take proof of its loss, and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon.

Application to court for judgment by default; when necessary.

§ 1214. Where the summons was personally served upon the defendant, within the State, and he has made default in appearing, or where the defendant has appeared, but has made default in pleading; and the case is not one, where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff must apply to the court for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or, if the default was in pleading, proof of appearance, and also if a copy of the complaint was demanded proof of service thereof, upon the defendant's attorney; and in either case, proof, by affidavit, of the default which entitles him to judgment.

Proceedings on such an application.

§ 1215. The court must thereupon render the judgment, to which the plaintiff is entitled. It may, without a jury or with a jury, if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it to render the judgment, or to carry it into effect; or it may, in its discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of inquiry. Where a reference or a writ of inquiry is directed the court may direct, that the report or inquisition be returned to the court for its further action; or it may, in its discretion, except where special provision is otherwise made by law, omit that direction; in which case, final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages ascertained by the inquisition, without any further application.

Application for judgment, in case of service by publication, etc.

§ 1216. Where the summons was served upon the defendant, without the State, or otherwise than personally, if the defendant does not demand a copy of the complaint or plead as the case requires, within twenty days after the service is complete, the plaintiff may apply to the court, for the judgment demanded in the complaint. Upon such an application he must file proof that the service is complete, and proof by affidavit of the defendant's default. The court must require proof of the cause of action, set forth in the complaint, to be made, either before the court, or before a referee, appointed for that purpose. If the defendant is a non-resident, or a foreign corporation, the court must require the plaintiff, or his agent, or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment, to which the plaintiff is entitled. But before rendering judgment, the court may, in any case, in its discretion, require the plaintiff to file an undertaking, to abide the order of the court, touching the restitution of any estate or effects which may be directed by the judgment to be transferred

or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action, and succeeds in his defence.

Attachment and undertaking for restitution, required in certain actions.

§ 1217. A judgment shall not be rendered for a sum of money only, upon an application made pursuant to the last section, except in an action specified in section six hundred and thirty-five of this act. Where the defendant is a non-resident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

1. Proof, by affidavit, that a warrant of attachment, granted in the action has been levied upon property of the defendant.

2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof, according to the inventory.

3. The undertaking mentioned in section twelve hundred and sixteen, if one has been required.

When judgment cannot be taken against infant.

§ 1218. A judgment by default shall not be taken against an infant defendant, until twenty days have expired since the appointment of a guardian ad litem for him.

When a defendant is entitled to notice.

§ 1219 A defendant, against whom judgment is taken, pursuant to the foregoing sections of this article, is entitled to notice as follows:

1. If he has appeared generally, but has made default in pleading, he is entitled to at least five days' notice of the time and place of an assessment by the clerk, and to at least eight days' notice of the time and place of an application to the court for judgment.

2. In a case where an application for judgment must be made to the court, the defendant may serve upon the plaintiff's attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference, or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature his office address, with the particulars, prescribed in section four hundred and seventeen of this act, concerning the office address of the plaintiff's attorney. Thereupon at least five days' notice of the time and place of the execution of the reference, or writ of inquiry, must be given to the defendant, by service thereof upon the person, whose name is subscribed to the demand, in the manner prescribed in this act, for service of a paper upon an attorney in an action.

When action may be severed, if issues of law and issues of fact presented.

§ 1220. Where an issue of law and an issue of fact arise, with respect to different causes of action, set forth in the complaint, and final judgment can be taken, with respect to one or more of the causes of action, without prejudice to either party in maintaining the action, or a defence or counterclaim, with respect to the other causes of action, or in the recovery of final judgment upon the whole issue, the court may, in its discretion, and at any stage of the action, direct that the action be divided into two or more actions, as the case requires.

Judgment how taken, after trial of issues of law and issues of fact, in the same action.

§ 1221. Where one or more issues of law, and one or more issues of fact, arise in the same action, and all the issues have been tried, final judgment upon the whole issue must be taken as follows:

1. Where an application must be made to the court, for judgment

upon the issue last tried, the application must be for judgment, upon the whole issue; and judgment must be rendered accordingly.

2. Where the action is triable by a jury, and the issue last tried is tried at a term of the court, the application for judgment, upon the whole issue, may be entertained, in the discretion of the court, at that term, and with or without notice; if not so entertained, it must be heard as a motion.

3. Where the issue last tried is tried before a referee, his report must award the proper judgment upon the whole issue, unless otherwise prescribed in the order of reference.

Id.; after trial of issue of law only.

§ 1222. Final judgment upon an issue of law, where no issue of fact remains to be tried, and final judgment has not been directed as prescribed* in section ten hundred and twenty-one of this act, may be entered upon application to the court, or by the clerk in an action specified in section four hundred and twenty of this act.

Proceedings upon application under the last two sections.

§ 1223. Upon an application, by either party, to the court, for final judgment, after the decision of an issue of law, as prescribed in the last two sections, the court has the powers specified in section one thousand two hundred and fifteen of this act, upon an application for judgment by the plaintiff. Where final judgment may be awarded in a referee's report, as prescribed in section twelve hundred and twenty-one of this act, the referee may make a computation, or an assessment, or take an account, or proof of a fact, for the purpose of enabling him to award the proper judgment, or enabling the court to carry it into effect; and he may ascertain and fix the damages, as a jury may do, upon the execution of a writ of inquiry.

Id.; upon interlocutory judgment, etc., affirmed at general term.

§ 1224. When an order or judgment is wholly or partly affirmed upon an appeal to the general term, and no issue of fact remains to be tried, the general term may, in its discretion, render final judgment, unless it permits the appellant to amend or plead over.

Judgment, after trial by jury of specific questions of fact.

§ 1225. In an action triable by the court, where one or more specific questions of fact, arising upon the issues, have been tried by a jury, judgment may be taken, upon the application of either party, as follows:

1. If all the issues of fact in the action are determined by the findings of the jury, or the remaining issues of fact have been determined by the decision of the court, or the report of a referee, an application for judgment, upon the whole issue, may be made as upon a motion.

2. If one or more issues of fact remain to be tried, judgment may be rendered upon the whole issue, at the term of the court where, or by direction of the referee by whom, they are tried.

Id.; after reference to determine specific questions of fact.

§ 1226. Where a reference has been made, to report upon one or more specific questions of fact, arising upon the issue, and the remaining issues have been tried, judgment must be taken, upon the application of either party, as prescribed in section one thousand two hundred and twenty-one of this act.

Id.; upon motion for new trial, heard at general term.

§ 1227. Where a motion for a new trial, made in the first instance at a general term is denied, judgment may be taken, as if the motion for a new trial had not been made, after the expiration of four days from the entry of the order, and the service, upon the attorney for the adverse party, of a copy thereof, and notice of the entry; but not before.

*So in the original.

ART. 2.

§ 1228. Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report.

Id.; upon trial by court or referee of the whole issue of fact.

§ 1229. In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made, as prescribed in section one thousand two hundred and fifteen of this act. Where a reference is made in such an action, the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court.

In matrimonial causes, judgment can be rendered only by the court.

§ 1230. In a case, not provided for in the foregoing sections of this article, where the decision, upon a trial by the court, without a jury, or the report, upon a trial by a referee directs an interlocutory judgment to be entered, and the party afterwards becomes entitled to a final judgment, an application for the latter may be made, as upon a motion. And where a judgment requires the appointment of a referee, to do any act thereunder, the referee must be appointed by the judgment or by the court, upon motion, except as otherwise prescribed in the next section.

Final judgment upon decision or report awarding interlocutory judgment, etc.

§ 1231. In an action triable by the court, an interlocutory judgment rendered upon a default in appearing or pleading, or pursuant to the direction contained in a decision or report, may state the substance of the final judgment, to which the party will be entitled. It may also direct, that the final judgment be settled by a judge, or a referee. In that case, final judgment shall not be entered, until a settlement thereof, subscribed by the judge or referee, is filed. Where an interlocutory judgment awards costs, they may be awarded generally, without specifying the amount thereof. Where the final judgment is directed to be settled, and the costs have not been taxed, when the settlement thereof is filed, a blank for the amount of the costs must be left in the settlement; and the costs must be taxed, and the blank filled up accordingly, by the clerk, when the final judgment is entered.

Id.; how final judgment entered and settled in certain cases.

§ 1232. Where a reference, or a writ of inquiry, directed as prescribed in section one thousand and fifteen, or section one thousand two hundred and fifteen of this act, has been executed, either party may apply for an order, directing a new hearing, or a new writ of inquiry, upon proof, by affidavit, that error was committed, to his prejudice, upon the hearing, or in the report, or upon the execution of the writ or in the inquisition. In a proper case, the application may be granted, after judgment has been entered. In that case, the judgment may be set aside, either then or after the new hearing, or the execution of the new writ, as justice requires.

Interlocutory reference or inquisition; how reviewed.

§ 1233. A motion for judgment, upon a special verdict, may be made by either party; and must, in the first instance, be heard and decided, at a term held by one judge.

Motion for judgment upon a special verdict, etc.

§ 1234. A motion for judgment, upon a verdict subject to the opinion of the court, may be made by either party; and must be heard and decided at the general term.

Id.; upon verdict subject to opinion of court.

TITLE I.

Interest on verdict, etc., to be included in recovery.

§ 1235. Where final judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest upon the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment.

Clerk to keep judgment book; judgment to be entered therein.

§ 1236. The clerk must keep, among the records of the court, a book for the entry of judgments, styled the "judgment-book." Each interlocutory or final judgment must be entered in the judgment-book, and attested by the signature of the clerk; who must note, in the margin of the entry, the day and year of entering it. It must specify clearly the relief granted, or other determination of the action, or of the issue.

Judgment-roll to be filed; of what it consists.

§ 1237. The clerk upon entering final judgment, must immediately file the judgment-roll; which must consist, except where special provision is otherwise made by law of the following papers: the summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits, or necessarily affects the judgment. If judgment is taken by default, the judgment-roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor; together with any report, decision or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment-roll must contain the verdict, report, or decision; each offer if any, made as prescribed in this act; and the exceptions or case then on file.

Id.; by whom prepared.

§ 1238. The judgment-roll must be prepared, and furnished to the clerk, by the attorney, for the party, at whose instance the final judgment is entered; except that the clerk must attach thereto the necessary original papers, on file. But the clerk may, at his option, make up the entire judgment-roll.

Time of filing judgment-roll to be noted.

§ 1239. The clerk must make a minute, upon the back of each judgment-roll, filed in his office, of the time of filing it, specifying the year, month, day, hour, and minute. A proceeding to enforce or collect a final judgment, cannot be taken, until the judgment-roll is filed.

When a judgment may be enforced by execution.

§ 1240. In either of the following cases, a final judgment may be enforced by execution:

1. Where it is for a sum of money, in favor of either party; or directs the payment of a sum of money.

2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.

3. In an action to recover a chattel, where it awards a chattel to either party.

When a judgment may be enforced by punishment for disobeying it.

§ 1241. In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court.

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section; in which case, the part

rts, which cannot be so enforced, may be enforced as prescribed s section.

Where the judgment is interlocutory, and requires a party to do, refrain from doing, an act; except in a case specified in the next vision.

Where the judgment requires the payment of money into court, an officer of the court; except where the money is due upon a ct, express or implied, or as damages for non-performance of a ct. In a case specified in this subdivision, if the judgment is it may be enforced, as prescribed in this section, either simulta ly with, or before or after the issuing of an execution thereupon, court directs.

Real property; how sold. Effect of conveyance.

242. Except where special provision is otherwise made by law, roperty, adjudged to be sold, must be sold in the county where ituated, by the sheriff of the county, or by a referee, appointed e court for that purpose, who must execute a conveyance to the aser. The conveyance is effectual, to pass the right title, or st of a party, adjudged to be sold; but nothing contained in this n shall be deemed to repeal or modify the provisions of any law lly regulating the sale of real property under a judgment or a e of any court, in any particular county of the State.

Security upon sale by referee.

243. Where a referee is appointed by the court, to sell real prop- the court may provide for his giving such security, as the court s just, for the proper application of the money received upon the or for the payment thereof by the purchaser, directly to the per- persons entitled thereto, or their attorneys.

Conveyance to state name of party.

244. A conveyance of property, sold by virtue of an execution, d pursuant to a judgment, which specifies the particular party or s, whose right, title or interest is directed to be sold, must dis- y state, in the granting clause thereof, whose right, title or inter- as sold, and is conveyed, without naming, in that clause, any of ther parties to the action; otherwise, the purchaser is not bound cept the conveyance, and, the officer executing it is liable for the ges, which the purchaser sustains by the omission, wheth * he ts or refuses to accept it.

ARTICLE THIRD.

ING A JUDGMENT; EFFECT THEREOF AS A LIEN UPON REAL PROPERTY; SUSPENDING AND DISCHARGING THE LIEN; SATISFACTION AND ASSIGNMENT OF A JUDGMENT.

ON 1245. Certain clerks to keep docket-books.
1246. Id.; to docket judgments.
1247. Filing transcripts, and docketing judgments thereon.
1248. Penalty for clerk's neglect.
1249. Dockets to be public.

* So in the original.

TITLE I.

1250. Judgment not to be a lien until docketed.
1251. Real property bound for ten years by a judgment thus docketed.
1252. Real property may be levied upon after ten years.
1253. Land held under contract not bound by judgment.
1254. Preference of mortgages for purchase money.
1255. Certain time not to be included in the ten years.
1256. Court may order lien of judgment to be suspended upon appeal.
1257. From what time order suspends the lien.
1258. How lien suspended in any other county.
1259. When and how lien restored.
1260. Docket of judgment, how cancelled.
1261. Satisfaction-piece to be given on payment of judgment.
1262. Assignor must acknowledge assignment.
1263. Assignee who is a receiver, etc., may file notice.
1264. Entry in docket, upon return of execution satisfied.
1265. Id.; where execution returned unsatisfied.
1266. Sheriff to give copy of satisfied execution; clerk to enter satisfaction.
1267. Docket; when to be discharged and cancelled.
1268. Discharge of a judgment against a bankrupt.
1269. Power of courts respecting docket.
1270. Clerk to file and note assignment of judgment.
1271. Judgments of United States courts may be docketed.
1272. To what judgments and executions this article applies.

Certain clerks to keep docket-books.

§ 1245. Each county clerk, each clerk of a superior city court, and the clerk of the marine court of the city of New-York, must keep one or more books, ruled in columns, convenient for making the entries, prescribed in the next section; in which he must docket, in its regular order and according to its priority, each judgment, which he is required by this article to docket. The expense of procuring a new book, when necessary, is a county charge.

Id.; to docket judgments.

§ 1246. Each clerk, specified in the last section, must, when he files a judgment-roll, upon a judgment, rendered in a court of which he is clerk, docket the judgment, by entering, in the proper docket-book, the following particulars, under the initial letter of the surname of the judgment debtor, in its alphabetical order:

1. The name, at length, of the judgment debtor; and also his residence, title, and trade or profession, if any of them are stated in the judgment.
2. The name of the party, in whose favor the judgment was rendered.
3. The sum, recovered or directed to be paid, in figures.
4. The day, hour, and minute, when the judgment-roll was filed.
5. The day, hour, and minute, when the judgment was docketed in his office.
6. The court in which the judgment was rendered, and if it was rendered in the supreme court, the county where the judgment-roll is filed.
7. The name of the attorney for the party recovering the judgment.

If there are two or more judgment debtors, those entries must be repeated, under the initial letter of the surname of each.

Filing transcripts, and docketing judgments thereon.

§ 1247. A clerk, with whom a judgment-roll is filed, upon a judgment docketed as prescribed in the last section, must furnish, to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk, to whom such a transcript is presented, must, upon payment of his fees therefor, immediately file it, and docket the judgment, as prescribed in the last section, in the appropriate docket-book, kept in his office.

Penalty for clerk's neglect.

§ 1248. A clerk who omits, as soon as practicable, to docket a judgment required to be docketed, or to furnish a transcript of a judgment,

keted in his office, as prescribed in the last two sections, forfeits, person aggrieved, two hundred and fifty dollars, in addition to amages sustained by reason of the omission.

Dockets to be public.

249. A docket-book, kept by a clerk, must be kept open, during usiness hours fixed by law, for search and examination by any n.

Judgment not to be a lien until docketed.

250. A judgment, required to be docketed, as prescribed in this e, neither affects real property or chattels real, nor is entitled to eference, until the judgment-roll is filed, and the judgment ted.

Real property bound for ten years by a judgment thus docketed.

251. Except as otherwise specially prescribed by law, a judgment, fter rendered, which is docketed in a county clerk's office, as pre- d in this article, binds, and is a charge upon, for ten years after the judgment-roll, and no longer, the real property and chattels n that county, which the judgment debtor has, at the time of so ting it, or which he acquires at any time afterwards, and within n years.

Real property may be levied upon after ten years.

252. When ten years after filing the judgment-roll have expired, roperty or a chattel real, which the judgment debtor, or real pro- which a person, deriving his right or title thereto, as the heir or e of the judgment debtor, then has, in any county, may be levied by virtue of an execution against property, issued to the sheriff t county, upon a judgment hereafter rendered, by filing, with the of that county, a notice, subscribed by the sheriff, describing the nent, the execution, and the property levied upon; and, if the st levied upon is that of an heir or devisee, specifying that fact, he name of the heir or devisee. The notice must be recorded and ed by the clerk, as a notice of the pendency of an action. For urpose, the judgment debtor, or his heir or devisee, named in the , is regarded as a party to an action. The judgment binds, and es a charge upon, the right and title thus levied upon, of the nent debtor, or of his heir or devisee, as the case may be, only the time of recording and indexing the notice, and until the exe- is set aside, or returned.

Land held under contract not bound by judgment.

253. The interest of a person, holding a contract for the purchase l property, is not bound by the docketing of a judgment; and t be levied upon or sold, by virtue of an execution issued upon a nent.

Preference of mortgages for purchase-money.

254. Where real property is sold and conveyed, and, at the same a mortgage thereupon is given by the purchaser, to secure the ent of the whole or a part of the purchase-money, the lien of the gage, upon that real property, is superior to the lien of a previous nent against the purchaser.

Certain time not to be included in the ten years.

255. The time, during which a judgment creditor is stayed, by an ction or other order, or by the operation of an appeal, or by express sion of law, from enforcing a judgment, is not a part of the ten , to which the lien of a judgment is limited by this article. But section does not extend the time of the lien, as against a purchaser, tor, or mortgagee in good faith.

Court may order lien of judgment to be suspended upon appeal.

1256. Where an appeal from a judgment has been perfected, and undertaking has been given, sufficient to entitle the appellant to a of the execution of the judgment, without an order for that pur- , the court in which the judgment was recovered, may, in its dis- ion and upon such terms as justice requires, make an order, upon ce to the attorney for the respondent, and to the sureties in the

undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real, upon which the judgment is a lien, or a portion thereof, specifically described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment-roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket-book, substantially as follows: "Lien suspended upon appeal. See order entered"; adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry, substantially as follows: "Lien partially suspended upon appeal. See order entered"; adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket-book, as required by the order.

From what time order suspends the lien.

§ 1257. Where an order is made, as prescribed in the last section, by the supreme court or by a county court, it operates as a suspension of the lien upon property situated in the county, where the judgment-roll is filed, from the time when the order is entered, and the proper entry made in the docket-book. If the property exempted is situated in another county, or if the order was made by a court, other than the supreme court or a county court, the order operates as a suspension, from the time, when the proper entry is made in the docket-book, kept by the clerk of that county, as prescribed in the next section.

How lien suspended in any other county.

§ 1258. The clerk, with whom the order is entered, must, upon payment of his fees therefor, furnish to the party who obtained the order, one or more transcripts, attested by his signature, of the docket of the judgment, including the entry made upon the docket. A county clerk, in whose office the judgment is docketed, must, upon payment of his fees therefor, immediately file such a transcript; and make an entry upon the docket of the judgment, in each place where it appears in his docket-book, substantially as follows: "Lien suspended", or, "Lien partially suspended", according to the entry upon the original docket, and also, "See transcript filed"; adding the proper date.

When and how lien restored.

§ 1259. At any time after a judgment, which has ceased to be a lien, as prescribed in the last three sections, is affirmed, or the appeal therefrom is dismissed, the lien thereof may be restored, as follows:

1. The clerk, in whose office the judgment of affirmance, or the order dismissing the appeal, is entered, must, upon the request of the judgment creditor, docket the judgment anew, as it was originally docketed, but in the order of priority of the new docket; and he must write upon the new docket, the words, "Lien restored by redocket"; adding the date of redocketing.

2. A transcript of the new docket must be furnished to a county clerk, in whose office an entry of the suspension of the lien has been made, as prescribed in the last two sections; and thereupon the judgment must be docketed by him anew, in the order of the priority of the new docket. The clerk who so redockets the judgment, must make an entry upon the new docket, substantially as follows: "Lien restored by redocket. See transcript filed"; adding the date of redocketing in his county.

The lien of the judgment is thereupon restored, for the unexpired period thereof, as if the order had not been made; but with like effect only, as against judgment creditors, purchasers, and mortgagees in good faith, as if the judgment had then been first docketed.

Docket of judgment,

§ 1260. The docket of a judgment must be cancelled and discharged

by the clerk, in whose office the judgment-roll is filed, upon filing with him a satisfaction-piece, describing the judgment, and executed as follows:

1. Except as otherwise prescribed in the next subdivision, the satisfaction-piece must be executed by the party, in whose favor the judgment was rendered, or his executor or administrator; or, if it is made within two years after the filing of the judgment-roll, by the attorney of record of the party. But where the authority of the attorney has been revoked, a satisfaction by him is not conclusive, against the person entitled to enforce the judgment, in respect to a person, who had actual notice of the revocation, before a payment on the judgment was made, or a purchase of property bound thereby was effected.

2. If an assignment of the judgment, executed by the party in whose favor it was rendered, or his executor or administrator, has been filed in the clerk's office, the satisfaction-piece must be executed by the person, who appears, from the assignment, or from the last of the subsequent assignments, if any, so filed, showing a continuous chain of title, to be the owner of the judgment; or by his executor or administrator.

3. If the satisfaction-piece is executed by an attorney in fact, in behalf of a person authorized to execute it, other than the attorney of record, an instrument, containing a power to acknowledge the satisfaction, must be filed with the satisfaction-piece, unless it has been recorded, in the proper book for recording deeds, in that or another county; in which case, the satisfaction-piece must refer to the record, and the clerk may, for his own indemnity, require evidence of a record remaining in another office.

The execution of each satisfaction-piece or power of attorney must be acknowledged, before the clerk, or his deputy, and certified by him thereupon; or it must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where it is filed.

Satisfaction-piece to be given on payment of judgment.

§ 1261. The person, entitled to enforce a judgment, must execute, and acknowledge before the proper officer, a satisfaction-piece thereof, at the request of the judgment debtor, or of a person interested in property bound by the judgment, upon presentation of a satisfaction-piece, and payment of the sum due upon the judgment, and the fees allowed by law for taking the acknowledgment of a deed.

Assignor must acknowledge assignment.

§ 1262. A person, who has heretofore executed, or hereafter executes, a written assignment of a judgment, owned by him, without acknowledging the executed* thereof, before an officer authorized to take the acknowledgment of a deed, must so acknowledge it, at the request of his assignee, or of a subsequent assignee thereof, or of the judgment debtor, upon presentation of the assignment, and payment of the officer's fees.

Assignee who is a receiver, etc., may file notice.

§ 1263. A resident of the State, or a person having an office within the State, for the regular transaction of business, in person, who becomes the owner of a judgment, by virtue of a general assignment for the benefit of creditors, or of an appointment as a receiver, or trustee or assignee of an insolvent debtor or bankrupt, may file with the clerk, in whose office the judgment-roll is filed, a notice of the assignment, or of his appointment, and of his ownership of the judgment. The notice must be subscribed by him, adding to his signature his place of residence, and also, if he resides without the State, his

* So in the original.

TITLE I.

office address. A notice so filed has the same force and effect, for the purposes of this article, as if it was an assignment of the judgment.

Entry in docket, upon return of execution satisfied.

§ 1264. Where an execution is returned, wholly or partly satisfied, the clerk must make an entry of the satisfaction, or partial satisfaction, in the docket of the judgment, upon which it was issued. Thereupon the judgment is deemed satisfied, to the extent of the amount returned as collected, unless the return is vacated by the court.

Id.; where execution returned unsatisfied.

§ 1265. Where an execution is returned wholly unsatisfied, the clerk must immediately make, in the docket of the judgment, upon which it was issued, an entry of the fact, stating the time when the execution was returned.

Sheriff to give copy of satisfied execution; clerk to enter satisfaction.

§ 1266. A sheriff, upon being paid the full amount due upon an execution in his hands, must immediately indorse thereupon a return of satisfaction thereof. He must also deliver, to the person making the payment, upon the latter's request, and payment of the fees allowed by law therefor, a certified copy of the execution, and of the return of satisfaction thereupon; which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket of the judgment, as if the judgment-roll was filed in his office, and the execution was returned to him, as satisfied. But this section does not exonerate the sheriff, from his duty to return the execution, to the clerk with whom the judgment-roll is filed.

Docket; when to be discharged and cancelled.

§ 1267. The clerk of a county, with whom a judgment has been docketed, must cancel and discharge the docket thereof, upon the filing, with him, of a certificate of the clerk, with whom the judgment-roll is filed, showing that the judgment has been reversed, vacated, or satisfied of record; or the certificate of the clerk of the county, with whom a copy of an execution, and of a return of satisfaction thereupon, have been filed, as prescribed in the last section, showing that they have been so filed, and the docket cancelled and discharged accordingly.

Discharge of a judgment against a bankrupt.

§ 1268. At any time after two years have elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of Congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, for an order, directing the judgment to be cancelled and discharged of record. If it appears that he has been discharged from the payment of that judgment, an order must be made accordingly; and thereupon the clerk must cancel and discharge the docket thereof, as if the proper satisfaction-piece of the judgment was filed. Notice of the application, accompanied with copies of the papers upon which it is made, must be given to the judgment creditor, unless his written consent to the granting of the order, with satisfactory proof of the execution thereof, and, if he is not the party in whose favor the judgment was rendered, that he is the owner thereof, is presented to the court, upon the application.

Power of courts respecting docket.

§ 1269. A court of record has the same power and jurisdiction, concerning the docket of its judgments, kept by a county clerk, which it has concerning the docket, kept by its own clerk. It may direct that such a docket be amended; or that its judgment, there docketed, be docketed nunc pro tunc.

Clerk to file and note assignment of judgment.

§ 1270. Upon the presentation, to the clerk of a court of record, of an assignment of a judgment, entered in his office, executed by a person entitled to satisfy the judgment, as prescribed in section one thousand two hundred and sixty of this act, and otherwise executed as prescribed in that section, with respect to a satisfaction-piece, and upon payment of the fees, allowed by law, for filing a transcript, and docketing a

judgment thereupon, the clerk must forthwith file the assignment in his office, and make, upon the docket of the judgment, an entry of the fact, and of the day of filing: or, if he keeps a separate book for the entry of assignments of judgments, an entry, referring to the page of the book, where the filing of the assignment is noted.

§ 1271. *

§ 1272. This article applies only to a judgment, wholly or partly for a sum of money, or directing the payment of a sum of money; and to an execution issued upon such a judgment. To what judgments and executions this article applies.

TITLE II.

Judgments taken without process.

ARTICLE 1. Confession of judgment.
2. Submission of a controversy, upon facts admitted.

ARTICLE FIRST.

CONFESSION OF JUDGMENT.

SECTION 1273. Judgment may be confessed. Married woman may confess.
1274. Statement; form thereof.
1275. Statement to be filed, and judgment entered.
1276. Judgment-roll; docketing and enforcing the judgment.
1277. Execution, where the judgment is not all due.
1278. Confession by one of several joint debtors.

§ 1273. A judgment by confession may be entered, without action, either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both, as prescribed in this article. A married woman may confess such a judgment, if the debt was contracted for the benefit of her separate estate, or in the course of any trade or other business carried on by her on her sole and separate account. Judgment may be confessed. When married woman may confess.

§ 1274. A written statement must be made, and signed by the defendant, to the following effect: Statement; form thereof.

1. It must state the sum, for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts, out of which the debt arose; and must show, that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed is for the purpose of securing the plaintiff, against a contingent liability, it must state concisely the facts, constituting the liability; and must show, that the sum confessed therefor does not exceed the amount of the liability.

The statement must be verified by the oath of the defendant, to the effect, that the matters of fact therein set forth are true.

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* Struck out by chap. 542 of 1879.

TITLE 2.

Statement to be filed, and judgment entered.

§ 1275. At any time within three years after the statement is verifi it may be filed with a county clerk, or with the clerk of a superior c court, or, where the sum, for which judgment is confessed, does exceed two thousand dollars, exclusive of interest from the time making the statement, with the clerk of the marine court of the of New-York. Thereupon the clerk must enter, in like manner a judgment is entered in an action, a judgment for the sum confes with costs, which he must tax, to the amount of fifteen dollars, besi disbursements taxable in an action. If the statement is filed wit county clerk, the judgment must be entered in the supreme court; is filed with the clerk of another court, specified in this section, judgment must be entered in the court of which he is clerk. Bu judgment shall not be entered upon such a statement, after the defe ant's death.

Judgment-roll; docketing and enforcing the judgment.

§ 1276. The clerk immediately after entering the judgment m attach togather* and file the statement, as verified, and a copy of judgment; which constitutes the judgment-roll. The judgment be docketed, and enforced against property, in the same manner, with the same effect, as a judgment in an action, rendered in same court; and each provision of law, relating to a judgment in action, and the proceedings subsequent thereto, apply to a judgm thus taken.

Execution, where the judgment is not all due.

§ 1277. Where the debt, for which the judgment is rendered, is all due, execution may be issued, upon the judgment, for the collect of the sum which has become due. The execution must be in the fo prescribed by law, for an execution upon a judgment for the full amo recovered; but the person, whose name is subscribed to it, must dorse thereupon a direction to the sheriff, to collect only the sum d stating the amount thereof, with interest thereon, and the costs of judgment. Notwithstanding the issuing and collection of such an ecution, the judgment shall remain, as security for the sum or sums become due, after the execution is issued. When a further sum comes due, an execution may, in like manner, be issued for the coll tion thereof; and successive executions may be issued, as further su become due.

Confession by one of several joint debtors.

§ 1278. One or more joint debtors may confess a judgment for a jo debt, due or to become due. Where all the joint debtors do not u in the confession, the judgment must be entered and enforced aga those only who confessed it; and it is not a bar to an action against the joint debtors, upon the same demand.

ARTICLE SECOND.

Submission of a Controversy, upon Facts admitted.

Section 1279. Controversy, how submitted without process.
1280. Papers to be filed; controversy thereupon becomes an action.
1281. Subsequent proceedings regulated.

Controversy, how submitted without process.

§ 1279. The parties to a question in difference, which might be subject of an action, being of full age, may agree upon a case, c taining a statement of the facts, upon which the controversy depen and may present a written submission thereof to a court of rec which would have jurisdiction of an action, brought for the same ca

*So in the original.

TITLE 3.

he case must be accompanied with the affidavit of one of the parties, the effect, that the controversy is real; and that the submission is ade in good faith, for the purpose of determining the rights of the rties. The submission must be acknowledged or proved, and cer- ied, in like manner as a deed, to be recorded in the county where is filed.

§ 1280. The case, submission, and affidavit, must be filed in the office the clerk of the court, to which the submission is made. If the sub- ission is made to the supreme court, they must be filed in the office the county clerk, if any, specified in the submission; if no county rk is so specified, they may be filed in the office of any county clerk. he filing is a presentation of the submission; and thenceforth the troversy becomes an action; and each provision of law, relating to proceeding in an action, applies to the subsequent proceedings therein, cept as otherwise prescribed in the next section.

Papers to be filed; controversy thereupon becomes an action.

§ 1281. An order of arrest, an injunction, or a warrant of attachment, anot be granted in such an action: the costs thereof are always in e discretion of the court, but costs cannot be taxed, for any proceed- gs before notice of trial: the action must be tried by the court, on the case alone: and the case, submission, affidavit, and a certified y of the judgment, and of any order or paper, necessarily affecting judgment, constitute the judgment-roll. If the action is in the reme court, a superior city court, or the marine court of the city of w-York, it must be tried, and judgment rendered, at the general n. If the statement of facts, contained in the case, is not sufficient nable the court to render judgment, an order must be made dis- sing the submission, without costs to either party; unless the court nits the parties, or, in a proper case, their representatives, to file an itional statement, which it may do, in its discretion, without preju- to the original statement.

Subsequent proceedings regulated.

TITLE III.

cating or setting aside a judgment, for irregularity or error in fact.

ION 1282. Motion to set aside judgment for irregularity; when it may be heard.
1283. Motion to set aside judgment for error in fact; when it may be made by party.
1284. Id.; after a party's death.
1285. Id.; by a person not a party.
1286. Id.; when several parties are entitled to move.
1287. To whom notice of the motion must be given.
1288. Id.; when real property recovered by the judgment has been conveyed.
1289. How notice given under this title.
1290. Within what time motion to be made.
1291. Exceptions in cases of disability.
1292. Restitution; when directed.

1282. A motion to set aside a final judgment, for irregularity, shall be heard, after the expiration of one year since the filing of the gment-roll; unless notice thereof is given for a day within the year,

Motion to set aside judgment for irregu-

larity; when it may be heard.

and either the hearing is adjourned, by one or more orders, until after the expiration of the year; or the term, for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.

Motion to set aside judgment for error in fact; when it may be made by party.

§ 1283. A motion to set aside a final judgment, rendered in a court of record, for error in fact, not arising upon the trial, may be made by the party against whom it is rendered; or, if an execution has not been issued thereon, and the judgment has not been wholly or partly satisfied or enforced, by the party in whose favor it is rendered.

Id.; after a party's death.

§ 1284. A like motion may be made, after the death of a party entitled to make it, as prescribed in the last section, by the following persons:

1. Where the judgment awards a sum of money, or a chattel, or an interest in real property, which is declared by law to be assets, the motion may be made by his executor or administrator.

2. Where the judgment awards real property, or the possession thereof, or where the title to or an estate or interest in real property is determined or affected thereby, the motion may be made by the heir of the decedent, to whom the real property descended, or might have descended, or by the person to whom he devised it.

3. Where the judgment is rendered against or in favor of two or more persons, the motion may be made, jointly, by the survivor, and the person who would have been entitled to make it, if the judgment had been rendered in favor of or against the decedent only.

Id.; by a person not a party.

§ 1285. A motion may be made, either before or after the death of the defendant, by a person, who is not a party, to set aside, for error in fact, not arising upon the trial, a judgment, rendered in an action against a tenant for life, or for years, awarding real property, or the possession of real property, in which the person making the motion has an estate, or interest, in reversion or remainder.

Id.; when several parties are entitled to move.

§ 1286. Where two or more persons are entitled to move to set aside a judgment, as prescribed in the last three sections, one or more of them may move separately; but, in that case, notice of the motion must be given to those who do not join therein, in like manner as if they were adverse parties.

To whom notice of the motion must be given.

§ 1287. Notice of a motion to set aside a final judgment, for error in fact, not arising upon the trial, must be given to the adverse party, or, in case of his death, to each person who might have moved, as against the moving party, to set aside the judgment for the same cause, as prescribed in this title. Where the motion is made by the party against whom the judgment is rendered, or by his heir, devisee, executor, or administrator, service of the notice, upon the attorney of record for the party, in whose favor the judgment is rendered, has the like effect, as if it was served upon the party.

Id.; when real property recovered by the judgment has been conveyed.

§ 1288. Where the judgment awards real property, or the possession thereof, or where the title to, or an estate or interest in, real property is determined or affected thereby, and the real property, or estate or interest therein, has been conveyed, by the adverse party, more than eight days before the hearing of the motion, notice of the motion must also be given to each actual occupant of the property, claiming under the conveyance.

How notice given under this title.

§ 1289. Notice must be given, in a case specified in this title, by personal service of a written notice, or of an order to show cause why the motion should not be granted; or, if a person entitled to notice cannot,

rith due diligence, be found within the State, in any manner which he court, or a judge thereof, directs in an order to show cause, or hich the court directs in a subsequent order.

Within what time motion to be made.

§ 1290. A motion to set aside a final judgment, for error in fact, not rising upon the trial, shall not be heard, except as specified in the next ction, after the expiration of two years since the filing of the judgment-roll, unless notice thereof is given, for a day within the two years; nd either the hearing is adjourned, by one or more orders, until after he expiration of the two years; or the term, for which it is thus oticed, is not held. In the latter event, the motion may be re-noticed r, and heard at, the next term at which it can be made, held not less han ten days after the day, when the first term was appointed to be eld.

Exceptions in cases of disability.

§ 1291. If the person, against whom the judgment is rendered, is, at he time of filing the judgment-roll, either

1. Within the age of twenty-one years; or

2. Insane; or

3. Imprisoned on a criminal charge, or in execution, upon conviction f a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time, limited by the ast section; except that the time, within which the motion may be eard, cannot be extended more than five years by such a disability, or, in any case, more than one year after the disability ceases.

Restitution; when directed.

§ 1292. Where a judgment is set aside for any cause, upon motion, he court may direct and enforce restitution, in like manner, with like ffect, and subject to the same conditions, as where a judgment is eversed upon appeal.

CHAPTER XII.

APPEALS.

TITLE I.—GENERAL PROVISIONS, RELATING TO THE APPEALS PROVIDED FOR IN THIS CHAPTER.
TITLE II.—APPEAL TO THE COURT OF APPEALS.
TITLE III.—APPEAL TO THE SUPREME COURT FROM AN INFERIOR COURT.
TITLE IV.—APPEAL TO THE GENERAL TERM OF THE SUPREME COURT, OR OF A SUPERIOR CITY COURT.
TITLE V.—APPEAL FROM A FINAL DETERMINATION IN A SPECIAL PROCEEDING.

TITLE I.

General provisions, relating to the appeals provided for in this chapter.

SECTION 1293. Writs of error abolished.
1294. When party may appeal.
1295. Parties to appeal; how designated. Title of cause.
1296. When a person entitled to become a party may appeal.
1297. Appeal when adverse party has died.
1298. Proceedings, when party dies pending appeal.
1299. Order of substitution.
1300. Appeal, how taken.
1301. When notice of appeal to specify interlocutory judgment, etc.
1302. Proceedings, if attorney or party not found.
1303. Defects in proceedings may be supplied.
1304. Order appealed from must be entered. Proceedings to compel entry.
1305. Security may be waived.
1306. Deposit, in lieu of undertaking.
1307. Undertaking must be filed.
1308. New undertaking to be given, when sureties are insolvent, etc.
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1310. When appeal stays proceedings; effect thereof.
1311. Levy upon personal property, when superseded by appeal.
1312. Court may limit amount of security in certain cases.
1313. No security necessary, on appeal by the people, etc.
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1315. Papers to be transmitted to appellate court.
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1317. Judgment or order on appeal.
1318. When no appeal lies from judgment of reversal.
1319. Mode of enforcing affirmed or modified judgment.
1320. Id.; as to order.
1321. Mode of cancelling docket of reversed or modified judgment.
1322. Id.; when reversal, etc., was by court of appeals.
1323. Restitution; when awarded.

Writs of error abolished.

§ 1293. The writ of error in a civil action or special proceeding has been abolished.

When party may appeal.

§ 1294. A party aggrieved may appeal, in a case prescribed in this

chapter, except where the judgment or order, of which he complains, was rendered or made upon his default.

Parties to appeal; how designated. Title of cause.

§ 1295. The party or person appealing is designated as the appellant, and the adverse party as the respondent. After an appeal is taken to another court, the name of the appellate court must be substituted, for that of the court below, in the title of the action or special proceeding, and in any case, the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed, in consequence of the appeal.

When a person entitled to become a party may appeal.

§ 1296. A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party; or who has acquired, since the making of the order, or the rendering of the judgment appealed from, an interest, which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a party. But the appeal cannot be heard, until he has been substituted in place of the party; and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed, upon motion of the respondent.

Appeal when adverse party has died.

§ 1297. Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted.

Proceedings, when party dies, pending appeal.

§ 1298. Where either party to an appeal dies, before the appeal is heard, or has heretofore died and the appeal has not been heard, if an order, substituting another person in his place, is not made, within three months after his death, or where he has heretofore died within three months after this section takes effect, the court, in which the appeal is pending, may, in its discretion, make an order, requiring all persons interested in the decedent's estate, to show cause before it, why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day, when cause is to be shown, which must be not less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises, as justice requires.

Order of substitution.

§ 1299. Where the appeal is from one court to another, an application for an order of substitution, as prescribed by the last three sections, must be made to the appellate court. Where personal service of notice of application for an order has been made, within the State, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

Appeal, how taken.

§ 1300. An appeal must be taken, by serving, upon the attorney for the adverse party, as prescribed in article third of title sixth of chapter eighth of this act, and upon the clerk, with whom the judgment or order appealed from is entered, by filing it in his office, a written notice, to the effect, that the appellant appeals from the judgment or order, or from a specified *part thereof*.

TITLE I.

When notice of appeal to specify interlocutory judgment, etc.

§ 1301. Where the appeal is from a final judgment, or from a final order in a special proceeding, and the appellant intends to bring up, for review thereupon, an interlocutory judgment, or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment, or intermediate order, to be reviewed.

Proceedings, if attorney or party not found.

§ 1302. If the attorney for the adverse party is dead; or if he has been removed, and notice of the removal has been served upon the appellant's attorney, and another attorney has not been substituted in his place; or if, for any reason, service of a notice of appeal, upon the proper attorney for the adverse party, cannot, with due diligence, be made within the State, the notice of appeal may be served upon the respondent, in the manner prescribed by law for serving it upon an attorney. If personal service upon the respondent cannot, with due diligence, be so made within the State, the notice of appeal may be served upon him, and notice of the subsequent proceedings may be given to him, as directed by a judge of the court, in or to which the appeal is taken.

Defects in proceedings may be supplied.

§ 1303. Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the judgment or order appealed from; the court, in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

Order appealed from must be entered. Proceedings to compel entry.

§ 1304. An appeal cannot be taken from an order made by a judge, out of court, until it is entered in the office of the proper clerk. Where such an order has not been so entered, or the papers, upon which it was founded, have not been filed in the same clerk's office, the judge who made it, or, if he is absent, or unable or disqualified to act, a judge of the court, in or to which an appeal therefrom may be taken, must, upon the application of a party or other person, entitled to take such an appeal, make an order, requiring the omission to be supplied, within a specified time after service of a copy of the order made by him. Upon proof, by affidavit, that a copy of the latter order has been served, and that the omission has not been supplied, the same judge may make, upon notice, an order revoking and annulling the original order. The provisions of the last section but one apply to the service of an order, or a notice, as prescribed in this section.

Security may be waived.

§ 1305. An undertaking, which the appellant is required, by this chapter, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent.

Deposit, in lieu of undertaking.

§ 1306. Where the appellant is required, by this chapter, to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the judgment or order appealed from is entered, a sum of money, equal to the amount, for which the undertaking is required to be given. The deposit has the same effect, as filing the undertaking; and notice that it has been made, has the same effect, as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode, in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.

Undertaking must be filed.

§ 1307. An undertaking, given as prescribed in this chapter, must

be filed with the clerk, with whom the judgment or order appealed from is entered.

New undertaking to be given, when sureties are insolvent, etc.

§ 1308. The court, in which the appeal is pending, upon satisfactory proof, by affidavit, that since the execution of an undertaking, given as prescribed in this chapter, one or more of the sureties therein have become insolvent; or that his or their circumstances have become so precarious, the*there is reason to apprehend, that the undertaking is not sufficient for the security of the respondent; may make an order, requiring the appellant to file a new undertaking, and to serve a copy thereof, as required with respect to the original undertaking. If the appellant fails so to do, within twenty days after the service of a copy of the order, or such further time as the court allows, the appeal must be dismissed, or the order or judgment, from which the appeal is taken, must be executed, as if the original undertaking had not been given.

Action upon undertaking, when not to be brought.

§ 1309. An action shall not be maintained, upon an undertaking, given upon an appeal, taken as prescribed in title third, fourth or fifth of this chapter, until ten days have expired, since the service, upon the attorney for the appellant, of a written notice of the entry of a judgment or order, affirming the judgment or order appealed from, or dismissing the appeal. Where an appeal to the court of appeals, from that judgment or order, is perfected, and security is given thereupon, to stay the execution of the judgment or order appealed from, an action shall not be maintained upon the undertaking, given upon the preceding appeal, until after the final determination of the appeal to the court of appeals.

When appeal stays proceedings; effect thereof.

§ 1310. Where an appeal has been perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from; except that the court or judge, from whose determination the appeal is taken, may proceed in any matter, included in the action or special proceeding, and not affected by the judgment or order appealed from, or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court, from or in which the appeal is taken; or, if it was taken as prescribed in title fifth of this chapter, into the supreme court.

Levy upon personal property, when superseded by appeal.

§ 1311. Where an appeal, taken, from a final judgment, to the court of appeals, has been perfected, and the security, required to stay the execution of the judgment, has been given; or where the security, given upon an appeal, taken from a final judgment of the supreme court, a superior city court, a county court, or the marine court of the city of New-York, is equal to that required to perfect an appeal to the court of appeals, and to stay the execution of the judgment; the court, in which the judgment appealed from was rendered, may, in its discretion, and upon such terms as justice requires, make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment.

Court may limit amount of security in certain cases.

§ 1312. Where an appeal is taken, as prescribed in title second or fourth of this chapter, the court, in or from which the appeal is taken; or, where an appeal is taken as prescribed in title third or fifth of this chapter, the court, to which the appeal is taken; may, in its discretion,

*So in the original.

TITLE I.

make an order, upon notice to the respondent, dispensing with or limiting the security, required to stay the execution of the judgment or order appealed from, as follows:

1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right, the security may be dispensed with or limited, in the discretion of the court.

2. The aggregate sum, in which one or more undertakings are required to be given, may be limited to not less than fifty thousand dollars, where it would otherwise exceed that sum.

No security necessary, on appeal by the people, etc.

§ 1313. Upon an appeal, taken by the people of the State, or by a State officer, or board of State officers, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security.

Id.; on appeal by a domestic municipal corporation.

§ 1314. Upon an appeal, taken by a domestic municipal corporation, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security; except that, where an appeal is taken, as prescribed in title second, third or fourth of this chapter, the court, in or from which the appeal is taken, may, in its discretion, require security to be given. In that case, the form, nature, and extent of the security, not exceeding that which is required in a like case, from a natural person, and the time and manner in which it must be given, must be prescribed by the order of the court; and the mayor, comptroller, or counsel to the corporation, may execute, in behalf of the corporation, an undertaking, so required to be given.

Papers to be transmitted to appellate court.

§ 1315. Where an appeal is taken from a final judgment, as prescribed in title second or third of this chapter, the appellant must, within twenty days after it is perfected, cause a certified copy of the notice of appeal, of the judgment-roll, and of a case or notice of exceptions, if any, filed after the entry of judgment, to be transmitted to the appellate court, by the clerk, upon whom the notice of appeal was served. Where an appeal from an order, or a part of an order, is taken as prescribed in title second, third, or fifth of this chapter, the appellant must, within the same time, cause a certified copy of the notice of appeal, of the order, and of the papers upon which the order was founded, to be transmitted to the appellate court, by the same clerk. If the appellant fails so to do, the respondent may cause those papers to be so transmitted; and he is entitled to tax the expense thereof, as a disbursement, where he recovers costs. The clerk of the appellate court must file the papers so transmitted; and, except where it is otherwise specially prescribed by law, the appeal must be heard upon them.

Interlocutory judgment, or intermediate order, may be reviewed.

§ 1316. An appeal, taken from a final judgment, brings up for review, an interlocutory judgment, or an intermediate order, which is specified in the notice of appeal, and necessarily affects the final judgment; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the term of the court, to which the appeal from the final judgment is taken. The right to review an interlocutory judgment, or an intermediate order, as prescribed in this section, is not affected by the expiration of the time, within which a separate appeal therefrom might have been taken.

Judgment or order on appeal.

§ 1317. Upon an appeal from a judgment or an order, the court, or the general term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any

or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed.

When no appeal lies from judgment of reversal.

§ 1318. Where a judgment, from which an appeal is taken, is reversed upon the appeal, and a new trial is granted, an appeal cannot be taken from the judgment of reversal; but upon an appeal from the order granting a new trial, taken, as prescribed by law, the judgment of reversal must also be reviewed.

Mode of enforcing affirmed or modified judgment.

§ 1319. Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced, by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken.

Id.; as to order.

§ 1320. Where a final order, from which an appeal has been taken, from one court to another, as prescribed in title fifth of this chapter, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for that purpose, to the court below, or to the judge who made the order appealed from.

Mode of cancelling docket of reversed or modified judgment.

§ 1321. Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or has been affirmed as to part only of the sum, upon an appeal, taken as prescribed in title third or fourth of this chapter; and an appeal to the court of appeals is not taken and perfected, and the security required to stay execution is not given, within ten days after the entry of the judgment upon the appeal, in the clerk's office where the judgment appealed from is entered, the clerk must make a minute of the reversal of the judgment, or of the amount to which it has been reduced, upon his docket-book, in each place, where the judgment is docketed. A transcript of the docket, as thus corrected, must be furnished by him, and may be filed in any county clerk's office, where the original judgment is docketed, as prescribed by law, with respect to the original docket; and thereupon the county clerk must correct his docket accordingly. The lien of a judgment, the docket of which is not corrected, as prescribed in this section, remains unaffected by the reversal or modification thereof, until the decision of the court of appeals, upon an appeal from the judgment reversing or modifying the same, or the expiration of the time to take such an appeal.

Id.; when reversal, etc., was by court of appeals.

§ 1322. Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or affirmed as to part only of the sum, upon an appeal to the court of appeals, the docket may be corrected, as prescribed in the last section, at any time after the remittitur has been filed in the court below.

Restitution; when awarded.

§ 1323. Where a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser, in good faith and for value, where property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires.

TITLE II.

Appeal to the court of appeals.

SECTION 1324. What appeals may be taken.
1325. Limitation of time to appeal.
1326. Security to perfect appeal.
1327. Security to stay execution on judgment, etc., for money.
1328. Id.; on judgment, etc., for delivery of property.
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1330. Id.; on judgment, etc., directing conveyance.
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1332. Construction of the last five sections.
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1334. Undertakings may be in one instrument; form and service thereof.
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1336. Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.
1337. What questions are brought up for review.
1338. When questions of fact to be reviewed.
1339. When a case to be prepared, etc., for the appeal.

What appeals may be taken.

§ 1324. An appeal may be taken to the court of appeals, in a case where that court has jurisdiction, as prescribed in sections one hundred and ninety and one hundred and ninety-one of this act.

Limitation of time to appeal.

§ 1325. An appeal to the court of appeals, from a final judgment, must be taken, within one year after final judgment is entered, upon the determination of the general term of the court below, and the judgment-roll filed. An appeal to the court of appeals, from an order, must be taken within sixty days after service, upon the attorney for the appellant, of a copy of the order appealed from, and a written notice of the entry thereof.

Security to perfect appeal.

§ 1326. To render a notice of appeal, to the court of appeals, effectual, for any purpose, except in a case where it is specially prescribed by law, that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title.

Security to stay execution on judgment, etc., for money.

§ 1327. If the appeal is taken from a judgment for a sum of money, or from a judgment or order, directing the payment of a sum of money, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect, that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum, recovered or directed to be paid, by the judgment or order, or the part thereof, as to which it is affirmed. But where the judgment or order directs the payment of money in fixed instalments, the undertaking must be to the effect, that the appellant will pay each instalment, which becomes payable, pending the appeal, or the part thereof as to which the judgment or order is affirmed, not exceeding a sum specified in the undertaking, which must be fixed by a judge of the court below. The court below may, at any time afterwards, upon satisfactory proof, by affidavit, that the sum so fixed is insufficient in amount, make an order, requiring the appellant to give a further undertaking, to the same effect, in a sum and within a time,

specified in the order. A failure to comply with such an order has the same effect, as if no undertaking had been given, as prescribed in this section.

Id.; on judgment, etc., for delivery of property.

§ 1328. If the appeal is taken from a judgment or order, directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or order, until the thing directed to be assigned or delivered, is brought into the court below, or placed in the custody of an officer or receiver, designated by that court; or the appellant gives a written undertaking as prescribed in the next section.

Id.; on judgment for a chattel.

§ 1329. If the appeal is taken from a judgment for the recovery of a chattel, it does not stay the execution of the judgment, until the appellant gives a written undertaking, in a sum fixed by the court below, or a judge thereof, to the effect that the appellant will obey the direction of the appellate court, upon the appeal.

Id.; on judgment, etc., directing conveyance.

§ 1330. If the appeal is taken from a judgment or order, directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court.

Id.; on judgment, etc., for possession of real property.

§ 1331. If the appeal is taken from a judgment, which entitles the respondent to the immediate possession of real property, or from a judgment or order, directing the sale or the delivery of possession of real property, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and that, if the judgment or order is affirmed, or the appeal is dismissed, he will pay the value of the use and occupation of the property, or the part thereof, as to which the judgment or order is affirmed from the time of taking the appeal, until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum, fixed by a judge of the court below. But if the judgment directs a foreclosure and sale, of real property mortgaged, an undertaking is sufficient to stay the execution of the judgment, which is to the effect that if the judgment is affirmed, or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, in discharging the sum to pay which the sale is directed, with interest, and the costs, and all expenses chargeable against the proceeds of the sale, not exceeding a specified sum, fixed by a judge of the court below.

Construction of the last five sections.

§ 1332. Where the judgment or order, from which an appeal is taken to the court of appeals, affirms a judgment or order, to the effect specified in either of the last five sections, the undertaking must be the same, as if the judgment or order, from which the appeal is so taken, was to the same effect, as the judgment or order so affirmed.

The last six sections qualified.

§ 1333. The last six sections do not extend to a case, where it is specially prescribed by law, that an appeal may be taken, or the execution of a judgment or order appealed from may be stayed, without security, or where the security to be given, for either purpose, is specially regulated by law.

Undertakings may be in one instrument; form and service thereof.

§ 1334. Where two or more undertakings are required to be given, as prescribed in this title they may be contained in the same instrument, or in different instruments at the option of the appellant. Each undertaking given as prescribed in this title must be executed by at least two sureties, and must specify the residence of each surety therein. A copy thereof with a notice showing where it is filed, must be served on the attorney for the adverse party with the notice of appeal or before the *expiration of the* time of appeal.

Exc[illegible] to [illegible]

§ 1335. *The attorney for the* respondent may, within ten days after

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justification.

service of a copy of the undertaking, with notice of the filing thereof, serve upon the attorney for the appellant, a written notice, that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking, to the same effect, must justify, before a judge of the court below, or a county judge. At least five days' notice of the justification must be given; in every other respect, the provisions of sections five hundred and seventy-eight, five hundred and seventy-nine, and five hundred and eighty of this act apply to the justification. If the judge finds the sureties sufficient, he must indorse his allowance of them, upon the undertaking, or a copy thereof; and a notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify, and to procure an allowance, is the same, as if the undertaking had not been given.

Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.

§ 1336. Where final judgment is rendered in the court below, after the affirmance, upon an appeal to the general term of that court, of an interlocutory judgment; or after the refusal, by the general term, of a new trial, either upon an application, made, in the first instance, at the general term, or upon an appeal from an order of the special term, or of the judge before whom the issues, or questions of fact, were tried by a jury; the party aggrieved may appeal directly from the final judgment to the court of appeals, notwithstanding that it was rendered at a special term, or at a trial term, or pursuant to the directions, contained in a referee's report. But such an appeal brings up, for review, only the determination of the general term, affirming the interlocutory judgment, or refusing the new trial.

What questions are brought up for review.

§ 1337. An appeal to the court of appeals from a final judgment, or from an order, granting or refusing a new trial in an action, or from a final order affecting a substantial right, made, either in a special proceeding, or upon a summary application after judgment in an action, brings up for review, in that court, every question, affecting a substantial right, and not resting in discretion, which was determined by the general term of the court below, in rendering the judgment or making the order, from which the appeal is taken; except that a question of fact, arising upon conflicting evidence, cannot be determined upon such an appeal, unless where special provision for the determination thereof is made by law.

When questions of fact to be reviewed.

§ 1338. Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon a referee's report, or a decision of the court, upon a trial without a jury; or from an order granting a new trial, upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears, in the body of the judgment or order appealed from. In that case, the court of appeals must review the determination of the general term of the court below, upon the questions of fact, as well as the questions of law.

When a case to be prepared, etc., for the appeal.

§ 1339. Where an appeal to the court of appeals, from a judgment, rendered at a general term of the court below, upon a verdict, subject to the opinion of the court, has been perfected, a case, containing a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those questions by the general term, must be prepared and settled, by or under the direction of the court below, and annexed to the judgment-roll. An exception is not necessary, to enable the court of appeals to review the determination of a question of law, arising upon the verdict. A certified copy of the case

must be transmitted to the court of appeals, instead of the case, upon which the judgment of the court below was rendered. The court below, or a judge thereof, may extend the time, limited by law, within which the papers must be transmitted to the court of appeals, for the purpose of enabling the appellant to procure the case to be prepared or settled.

TITLE III.

Appeal to the supreme court from an inferior court.

SECTION 1340. Appeal from judgment.
1341. Limitation of time; security.
1342. Appeal from order.
1343. Limitation of time and stay of proceedings.
1344. Appeal, where and how heard.
1345. Judgment or order, where entered.

Appeal from judgment.

§ 1340. An appeal may be taken, to the supreme court, from a final judgment, rendered by a county court, or by any other court of record, possessing original jurisdiction, where an appeal therefrom to a court, other than the supreme court, is not expressly given by statute.

Limitation of time; security.

§ 1341. An appeal, authorized by the last section, must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment and notice of the entry thereof. Upon such an appeal, security must be given, to perfect the appeal, or to stay the execution of the judgment, and the sureties may be excepted to, and must justify, as upon an appeal to the court of appeals, from a judgment of the same amount, or to the same effect.

Appeal from order.

§ 1342. An appeal may also be taken, to the supreme court, from an order, affecting a substantial right, made by the court or a judge, in an action brought in a court, specified in the last section but one.

Limitation of time and stay of proceedings.

§ 1343. An appeal, authorized by the last section, must be taken, within sixty days after service upon the attorney for the appellant, of a copy of the order, and written notice of the entry thereof. Security is not required to perfect it; but it does not stay the execution of the order from which it is taken. The appellate court, or a judge thereof, may direct such a stay, upon such terms, as to security or otherwise, as justice requires.

Appeal, where and how heard.

§ 1344. An appeal, taken as prescribed in this title, must be heard at the general term. The provisions of title fourth of this chapter, relating to the hearing of appeals, taken in the supreme court, and to the subsequent proceedings thereupon, apply to an appeal, taken as prescribed in this title, except as specified in the next section.

Judgment or order, where entered.

§ 1345. A judgment of the supreme court, rendered upon an appeal authorized by this title, must be entered in the judgment-book, kept in the office of the clerk of the county, wherein the court below is located. The judgment-roll must be filed in the same office; and must consist of a certified copy of the judgment, annexed to the papers transmitted from the court below. An order of the supreme court, made upon such an appeal, must be entered, and the papers, upon which the appeal was heard, must be filed, in the office of the same clerk. The filing of the judgment-roll, or the entry of the order, as prescribed in this section, is a sufficient authority for any proceeding

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in the court below, or before the judge, who made the order appealed from, which the judgment or order of the appellate court directs or permits. But where the execution of the judgment or order of the appellate court is stayed, by an appeal to the court of appeals, the proceedings in the court below, or before the judge who made the order, are stayed in like manner.

TITLE IV.

Appeal to the general term of the supreme court, or of a superior city court.

SECTION 1346. Appeal from judgment.
1347. Appeal from order.
1348. Id.; when made out of court.
1349. Appeal from interlocutory judgment.
1350. Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.
1351. Limitation of time; order to stay proceedings.
1352. Stay of proceedings without order.
1353. Upon what papers appeal to be heard.
1354. Entry of judgment or order; judgment-roll.
1355. Hearing, etc., in the supreme court.

Appeal from judgment.

§ 1346. An appeal may be taken, to the general term of the supreme court, or of a superior city court, from a final judgment rendered in the same court, as follows:

1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

2. Where the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law.

Appeal from order.

§ 1347. An appeal may be taken, to the general term of the supreme court, or of a superior city court, from an order, made in an action, upon notice, at a special term or a trial term of the same court, or, in the supreme court, at a term of the circuit court, in either of the following cases:

1. Where the order grants, refuses, continues, or modifies a provisional remedy.

2. Where it grants, or refuses a new trial; except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, as prescribed in section nine hundred and seventy-one of this act, an appeal cannot be taken from an order, granting or refusing a new trial, upon the merits.

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action, and prevents a judgment, from which an appeal might be taken.

6. Where it determines a statutory provision of the State to b unconstitutional; and the determination appears from the reason given for the decision thereupon, or is necessarily implied in the decision.

rder, made upon a summary application, after judgment, is to have been made, in the action, within the meaning of this

8. An appeal may also be taken, to the general term of either courts, from an order, made in an action, upon notice, by e, out of court, in a case where an appeal might have been as prescribed in the last section, if the order had been made by rt. Id.; when made out of court.

9. An appeal may also be taken, to the general term of either courts, from an interlocutory judgment, rendered at a special trial term of the same court, or, in the supreme court, at a term circuit court. Appeal from interlocutory judgment.

0. Where final judgment is taken, at a special term or trial pursuant to the directions of a referee, after the affirmance, appeal to the general term, of an interlocutory judgment; or e refusal, by the general term, of a new trial, either upon an tion, made, in the first instance, at the general term, or upon eal from an order of the special term, or of the judge, before he issues, or questions of fact, were tried by a jury; an appeal general term from the final judgment brings up, for review, only ceedings to take the final judgment, or upon which the final nt was taken, including the hearing or trial of the other issues action, if any. If an appeal is taken, to the court of appeals, e determination of the general term, upon the appeal from the dgment, the determination of the general term, affirming the utory judgment or refusing the new trial, may, at the election r party, be reviewed thereupon. If the respondent elects to up for review, he may take a cross-appeal therefrom, notwithg the expiration of the time to take an original appeal there- Appeal from final judgment, afteraffirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

1. An appeal, authorized by this title, must be taken, within ays after service, upon the attorney for the appellant, of a copy judgment or order appealed from, and a written notice of the hereof. Security is not required to perfect the appeal; but, where it is otherwise specially prescribed by law, the appeal t stay the execution of the judgment or order appealed from; the court, in or from which the appeal is taken, or a judge makes an order, directing such a stay. Such an order may be nd may, from time to time, be modified, upon such terms, as ity or otherwise, as justice requires. If security is given, either dition of granting the order, or as prescribed in the next sece provisions of title second of this chapter apply thereto, as if eral term was specified in those provisions, in place of the te court, and a judge of the same court, in place of a judge of rt below. Limitation of time; order to stay proceedings.

2. Upon an appeal from a final judgment, taken as prescribed title, the appellant may give the security, required to perfect eal to the court of appeals, from a judgment of the same amount, e same effect; and to stay the execution thereof. In that case, ecution of the judgment appealed from is stayed, as upon an to the court of appeals, and subject to the same conditions. Stay of proceedings without order.

3. An appeal from a final judgment, taken as prescribed in this ust be heard upon a certified copy of the notice of appeal, of the ent-roll, and of the case or notice of exceptions, if any, filed, as ibed by law or the general rules of practice, after the entry of Upon what papers appeal to be heard.

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the judgment, and either before or after the appeal is taken. An appeal from an interlocutory judgment, or from an order, taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, and of the papers used before the court or the judge, upon the hearing of the demurrer, application for judgment, or motion, as the case requires.

Entry of judgment or order; judgment-roll.

§ 1354. When judgment of affirmance is rendered upon the appeal, the judgment-roll consists of a copy of the judgment, annexed to the papers, upon which the appeal was heard. Where subsequent proceedings are taken, at the special term or trial term, before the entry of final judgment, the judgment-roll must also contain the proper papers relating thereto.

Hearing, etc., in the supreme court.

§ 1355. An appeal taken to the general term of the supreme court, as prescribed in this title, must be heard in the department, embracing the county, in which the judgment or order appealed from is entered; unless an order is made, as prescribed in section two hundred and thirty-one of this act, directing that it be heard in another department. The judgment rendered, or the order made, upon the appeal, must be entered, and the judgment-roll, or the papers upon which the appeal was determined, as the case requires, must be filed, in the office of the clerk of the county, where the judgment or order appealed from is entered. If the appeal is determined at a general term, held in another county, the clerk of that county must, at the expense of the successful party, transmit a certified copy of the determination, and the other papers, if any, required to be filed, to the clerk of the county where the judgment or order is to be entered.

TITLE V.

Appeal from a final determination in a special proceeding.

SECTION 1356. Appeal from order made in the same court.
1357. Id.; when made by another court or judge.
1358. Intermediate order may be reviewed.
1359. Limitation of time to appeal.
1360. Stay of proceedings; hearing of appeal; decision thereupon.
1361. This title qualified. Application of provisions relating to actions.

Appeal from order made in the same court.

§ 1356. An appeal may be taken, to the general term of the supreme court, or of a superior city court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the same court, or, in the supreme court, at a term of a circuit court; or made by a judge of the same court, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him.

Id.; when made by another court or judge.

§ 1357. An appeal may also be taken to the supreme court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, the judge who made the final order.

But this section does not apply to a case, where an appeal from the order, to a court, other than the supreme court, is expressly given by statute.

Preceding order may be reviewed.

§ 1358. An appeal, authorized by this title, brings up for review, any preceding order, made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

Limitation of time to appeal.

§ 1359. An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney at law or an attorney in fact, upon the person who so appeared for him.

Stay of proceedings; hearing of appeal; decision thereupon.

§ 1360. The provisions of title fourth of this chapter, relating to perfecting an appeal from an order, taken as therein prescribed; to staying the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title, except as otherwise specially prescribed by law.

This title qualified. Application of provisions relating to actions.

§ 1361. This title does not confer the right to appeal from an order, in a case, where it is specially prescribed by law, that the order cannot be reviewed. The proceedings upon an appeal, taken as prescribed in this title, are governed by the provisions of this act, and of the general rules of practice, relating to an appeal in an action, except as otherwise specially prescribed by law.

CHAPTER XIII.

EXECUTIONS.

TITLE I.—FORMS OF EXECUTION; TIME AND MANNER OF ISSUING AN EXECUTION; GENERAL DUTIES AND LIABILITIES OF OFFICERS.

TITLE II.—EXECUTION AGAINST PROPERTY.

TITLE III.—EXECUTION AGAINST THE PERSON.

TITLE I.

Forms of execution; time and manner of issuing an execution; general duties and liabilities of officers.

SECTION 1362. To whom execution directed; provision where sheriff is a party.
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1364. The different kinds of execution.
1365. To what counties executions may issue.
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To whom execution directed; provision where sheriff is a party.

§ 1362. An execution must be directed to the sheriff, unless he is a party or interested; in which case it must be directed as prescribed in section one hundred and seventy-three of this act. But the court may, in its discretion, order an execution, issued upon a judgment rendered against a sheriff, either alone or with another, to be directed to a person, designated in the order, instead of to the coroners, or a particular

coroner; in which case it must be so directed. The person so designated must be of full age, a resident of the State, and not a party to the action, or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so designated executes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be collected by virtue of the execution; conditioned for the faithful performance of his duties under the execution. A certified copy of the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.

Time of receipt to be indorsed on execution.

§ 1363. The sheriff, to whom an execution is directed and delivered, must, upon the receipt thereof, indorse thereupon a memorandum of the day, hour, and minute, when he received it.

The different kinds of execution.

§ 1364. There are four kinds of execution, as follows:

1. Against property.

2. Against the person.

3. For the delivery of the possession of real property, with or without damages for withholding the same.

4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

An execution is the process of the court, from which it is issued.

To what counties executions may issue.

§ 1365. An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution against the person may be issued to any county. An execution for the delivery of the possession of real property, must be issued to the county, where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel, may be issued to any county, where the chattel is found; or to the sheriff of the county where the judgment-roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties.

General requisites of executions.

§ 1366. An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered; and, if it was rendered in the supreme court, the county in which the judgment-roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in the next section, it must be made returnable to the clerk, with whom the judgment-roll is filed.

Id.; when issued on filing transcript from justice's court, etc.

§ 1367. Where an execution is issued out of a court, other than that in which the judgment was rendered, upon filing a transcript of the judgment rendered in the latter court, it must also specify the clerk, with whom the transcript is filed, and the time of filing; and it must be made returnable to that clerk. If the judgment was rendered in a justice's court, it must specify the justice's name; and it must omit the specification, respecting the filing of the judgment-roll.

Requisites of execution for the collection of money.

§ 1368. An execution, issued upon a judgment for a sum of money, directing the payment of a sum of money, must specify, in the body thereof, the sum recovered, or directed to be paid, and the sum actually due when it is issued. It may specify a day, from which interest upon

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the sum due is to be computed; in which case, the sheriff must collect interest accordingly, until the sum is paid. If all the parties, against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor.

Id.; against property.

§ 1369. An execution against property must, if the judgment-roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county. It must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment, out of the personal property of the judgment debtor; and, if sufficient personal property cannot be found, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

Id.; where a warrant of attachment has been levied by sheriff.

§ 1370. Where a warrant of attachment, issued in the action, has been levied, by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the State, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

Id.; against executor, etc.

§ 1371. An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee, must substantially require the sheriff to satisfy the judgment, out of that property.

Id.; against the person.

§ 1372. An execution against the person must substantially require the sheriff, to arrest the judgment debtor, and commit him to the jail of the county, until he pays the judgment, or is discharged according to law. Except where it may be issued, without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued.

Id.; for delivery of property. How money, recovered by same judgment, may be collected.

§ 1373. An execution for the delivery of the possession of real property, or a chattel, must particularly describe the property, and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff, to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected, by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.

Separate executions, where separate sums awarded.

§ 1374. Where a judgment awards different sums of money, to or against different parties, a separate execution may be issued, to collect each sum so awarded; subject to the power of the court, to control the enforcement of the executions, upon motion, where the collection of one execution will, wholly or partly, satisfy another.

§ 1375. Except as otherwise specially prescribed by law, the party overing a final judgment, or his assignee, may have execution there- on, of course, at any time within five years after the entry of the lgment. Execution of course, within five years.

§ 1376. Where the party recovering a final judgment has died, exe- ion may be issued at any time within five years after the entry of judgment, by his personal representatives, or by the assignee of judgment, if it has been assigned, and the execution must be in- sed with the name and residence of the person issuing the same. Execution, after death of judgment creditor.

§ 1377. After the lapse of five years from the entry of a final judg- nt, execution can be issued thereupon, in one of the following cases y: When execution may be issued after five years.

1. Where an execution was issued thereupon within five years after entry of the judgment, and has been returned wholly or partly satisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the ecution.

§ 1378. Notice of an application for an order, granting leave to issue execution, as prescribed in the last section, must be served person- y upon the adverse party, if he is a resident of the State, and rsonal service can, with reasonable diligence, be made upon him erein; otherwise, notice must be given in such manner as the court rects. Where the judgment is for a sum of money, or directs the yment of a sum of money, leave shall not be granted, except on oof, by affidavit, to the satisfaction of the court, that the judgment mains wholly or partly unsatisfied. Id.; leave how obtained.

§ 1379. An execution to collect a sum of money cannot be issued, gainst the property of a judgment debtor, who has died since the try of the judgment, except as prescribed in the next two sections. No execution against decedent, except, etc.

§ 1380. After the expiration of one year from the death of a party, gainst whom a final judgment for a sum of money, or directing the yment of a sum of money, is rendered, the judgment may be en- rced by execution, against any property upon which it is a lien, ith like effect as if the judgment debtor was still living. But such execution shall not be issued, unless an order, granting leave to ue it, is procured from the court, from which the execution is to be ued, and a decree, to the same effect, is procured from a surrogate's urt of the State, which has duly granted letters testamentary or ters of administration, upon the estate of the deceased judgment btor. Where the lien of the judgment was created as prescribed in tion twelve hundred and fifty-one of this act, neither the order nor e decree can be made until the expiration of three years after letters stamentary or letters of administration have been duly granted upon e estate of the decedent; and for that purpose such a lien, existing the decedent's death, continues for three years and six months reafter, notwithstanding the previous expiration of ten years from e filing of the judgment-roll. Leave required to issue execution against decedent's property.

§ 1381. Leave to issue an execution, as prescribed in the last sec- n, must be procured as follows: Leave, how obtained.

1. Notice of the application, to the court, from which the execution to be issued, for an order, granting leave to issue the execution, must given to the person or persons, whose interest in the property will affected by a sale by virtue of the execution, and also to the execu- or administrator of the judgment debtor. The general rules of actice may prescribe the manner in which the notice must be given; til provision is so made therein, it must be served, either personally,

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or in such manner as the court prescribes, in an order to show cause. Leave shall not be granted, except upon proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.

2. For the purpose of procuring a decree from the surrogate's court, granting leave to issue the execution, the judgment creditor must present to that court, a written petition, duly verified, setting forth the facts, and praying for such a decree; and that the persons, specified in the first subdivision of this section, may be cited, to show cause why it should not be granted. Upon the presentation of such a petition, the surrogate must issue a citation accordingly; and, upon the return thereof, he must make such a decree in the premises, as justice requires.

Time of stay by order, etc., not reckoned under this title.

§ 1382. The time during which the person, entitled to enforce a judgment, is stayed from enforcing it, by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not a part of the time, limited by this title, for issuing an execution thereupon, or for making an application for leave to issue such an execution.

Execution against surviving judgment debtors.

§ 1383. The last six sections do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution, out of any property which belonged to him.

Sale on execution, etc.; when and how conducted.

§ 1384. A sale of real or personal property, by virtue of an execution, or pursuant to the directions contained in a judgment or order, must be made at public auction, between the hour of nine o'clock in the morning and sunset.

Penalty for taking down or defacing notice of sale.

§ 1385. A person who, before the time fixed for the sale, in a notice of the sale of property, to be made by virtue of an execution, wilfully takes down or defaces such a notice put up by the sheriff, or by his authority, forfeits fifty dollars to the judgment creditor, and the same sum to the judgment debtor; unless the notice was defaced or taken down, with the consent of the person seeking to enforce the forfeiture, or the execution was previously satisfied.

Validity of sale, when not affected by sheriff's default, etc.

§ 1386. An omission by the sheriff to give notice, as required by law, or the taking down or defacing of a notice, when put up, does not *effect the validity of a sale, made by virtue of an execution, to a purchaser in good faith, without notice of the omission or offence.

Purchases on such sales, by certain officers, prohibited.

§ 1387. The sheriff, to whom an execution is directed, or the under-sheriff or deputy-sheriff, holding an execution, and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him, or to his use, is void.

When execution to be enforced by under-sheriff.

§ 1388. Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under-sheriff must proceed upon the execution, as the sheriff might have done. If there is no under-sheriff, the court, from which the execution issued, may designate a person to proceed thereupon; who may complete the same, as an under-sheriff might have done. The person so designated must give such security as the court directs. He is deemed an officer; and is subject to the

* So in the original.

same obligations and liabilities, and has the same power and authority, in relation to the object of his appointment, as a sheriff, and is entitled to fees accordingly. But this section does not apply, in a case where special provision is otherwise made by law, for the enforcement of an execution, after the death, removal from office, or other disqualification, of the sheriff, or under-sheriff.

TITLE II.

Execution against property.

ARTICLE 1. Property exempt from levy and sale.
2. Lien of an execution upon personal property; levy upon and sale of personal property. Rights of indemnitors of sheriff.
3. Sale, redemption, and conveyance of real property; rights and liabilities of persons interested.
4. Remedies for failure of title to real property sold, and to enforce contribution.

ARTICLE FIRST.

PROPERTY EXEMPT FROM LEVY AND SALE.

SECTION 1389. Certain special exemptions not affected by this article.
1390. What personal property is exempt, when owned by a householder.
1391. Additional personal property exempt in certain cases.
1392. Widow, etc., or married woman entitled to exemption as a householder.
1393. Military pay, rewards, etc., exempt from execution and other legal proceedings.
1394. Right of action for taking, etc., exempt property.
1395. Burying ground; when exempted.
1396. How exempt burying ground designated.
1397. Homestead; when exempted.
1398. How exempt homestead designated.
1399. Married woman's homestead; when exempted.
1400. When exemption to continue after owner's death.
1401. Exemption; when not affected by temporary suspension of residence.
1402. If value of homestead exceeds one thousand dollars, lien attaches to surplus.
1403. Id.; how proceeds to be marshalled when property is sold.
1404. Exemption of real property, how cancelled.

Certain special exemptions not affected by this article.

§ 1389. The enumeration, in this article, of the property which is exempt from levy and sale by virtue of an execution, does not repeal any special provision of law, relating to such an exemption, which, by its terms, is applicable only to a particular class of persons, or corporations, or to a particular locality, or otherwise to a special case.

What personal property is exempt, when owned by a householder.

§ 1390. The following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution; and each moveable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another:

1. All spinning wheels, weaving looms, and stoves, put up, or kept for use, in a dwelling house; and one sewing machine, with its appurtenances.

2. The family bible, family pictures, and school-books, used by or in the family; and other books, not exceeding in value fifty dollars, kept and used as part of the family library.

3. A seat or pew, occupied by the judgment debtor, or the family, in a place of public worship.

4. Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour, and vegetables, actually provided for family use; and necessary fuel, oil, and candles, for the use of the family for sixty days.

5. All wearing apparel, beds, bedsteads, and bedding, necessary for the judgment debtor and the family; all necessary cooking utensils; one table; six chairs; six knives; six forks; six spoons; six plates; six tea cups; six saucers; one sugar dish; one milk pot; one tea pot; one crane and its appendages; one pair of andirons; one coal-scuttle; one shovel; one pair of tongs; one lamp; and one candlestick.

6. The tools and implements of a mechanic, necessary to the carrying on of his trade, not exceeding in value twenty-five dollars.

Additional personal property exempt in certain cases.

§ 1391. In addition to the exemptions, allowed by the last section, necessary household furniture, working tools, and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic, or for the purchase-money, of one or more articles, except as prescribed in this or the last section.

Widow, etc., entitled to same exemption as householder.

§ 1392. Where the judgment debtor is a woman, she is entitled to the same exemptions, from levy and sale by virtue of an execution, subject to the same exceptions, as prescribed in the last two sections, in the case of a householder.

Military pay, rewards, etc., exempt from execution and other legal proceedings.

§ 1393. The pay and bounty of a non-commissioned officer, musician, or private, in the military or naval service of the United States; a land warrant, pension, or other reward, heretofore or hereafter granted by the United States, or by a State, for military or naval services; a sword, horse, medal, emblem, or device of any kind, presented, as a testimonial, for services rendered in the military or naval service of the United States; and the uniform, arms, and equipments, which were used by a person in that service, are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding.

Right of action for taking, etc., exempt property.

§ 1394. A right of action to recover damages, or damages awarded by a judgment, for taking or injuring personal property, exempt by law from levy and sale, by virtue of an execution, are exempt, for one year after the collection thereof, from levy and sale, by virtue of an execution, and from seizure in any other legal proceeding.

Burying ground; when exempted.

§ 1395. Land set apart as a family or private burying ground, and heretofore designated, as prescribed by law, in order to exempt the same, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, upon the following conditions, only:

1. A portion of it must have been actually used for that purpose.
2. It must not exceed in extent, one-fourth of an acre.

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must not contain, at the time of its designation, or at any time
rds, any building or structure, except one or more vaults, or
laces of deposit for the dead, or mortuary monuments.

6. In order to designate land, to be exempted as prescribed in
section, a notice, containing a full description of the land to be
ed, and stating that it has been set apart for a family or private
ground, must be subscribed by the owner; acknowledged or
and certified, in like manner as a deed to be recorded in the
where the land is situated; and recorded in the office of the
r register of that county, in the proper book for recording
at least three days before the sale of the land, by virtue of the
on.

How exempt burying ground designated.

7. A lot of land, with one or more buildings thereon, not
ng in value one thousand dollars, owned, and occupied as a
ce, by a householder having a family, and heretofore designated
xempt homestead, as prescribed by law, or hereafter designated
purpose, as prescribed in the next section, is exempt from sale,
ne of an execution, issued upon a judgment, recovered for a
ntracted after the thirtieth day of April, eighteen hundred and
nless the judgment was recovered wholly for a debt or debts,
ted before the designation of the property, or for the purchase-
thereof.

Homestead; when exempted.

8. In order to designate property, to be exempted as prescribed
ast section, a conveyance thereof, stating, in substance, that it
ned to be held as a homestead, exempt from sale by virtue of
cution, must be recorded, as prescribed by law; or a notice,
ing a full description of the property, and stating that it is
d to be so held, must be subscribed by the owner, acknowledged
ed, and certified, in like manner as a deed to be recorded in the
where the property is situated; and must be recorded in the
the clerk of that county, in a book kept for that purpose, and
he "homestead exemption book."

How exempt homestead designated.

9. A lot of land, with one or more buildings thereon, owned by
ed woman, and occupied by her as a residence, may be desig-
s her exempt homestead, as prescribed in the last section; and
perty so designated is exempt from sale, by virtue of an exe-
under the same circumstances, and subject to the same excep-
s the homestead of a householder, having a family.

Married woman's homestead; when exempted.

0. The exemption, prescribed by the last three sections, con-
after the death of the person in whose favor the property was
ed, as follows:

When exemption to continue after owner's death.

the decedent was a woman, it continues, for the benefit of her
ng children, until the majority of the youngest surviving child.
the decedent was a man, it continues, for the benefit of his
and surviving children, until the majority of the youngest sur-
child, and until the death of the widow.
he exemption ceases earlier, if the property ceases to be occu-
a residence, by a person for whose benefit it may so continue,
s otherwise prescribed in the next section.

Exemption; when not affected by temporary suspension of residence.

1. The right to exemption, of a person entitled thereto, as pre-
in the last four sections, is not affected by a suspension of the
ion of the exempt property, as a residence, for a period not
ng one year, which occurs in consequence of injury to, or
ion of, the dwelling house upon the premises.

If value of home-

2. The exemption of a homestead, otherwise valid under the

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stead exceeds $1,000, lien attaches to surplus.

provisions of this article, is not void, because the value of the property, designated as exempt, exceeds one thousand dollars. In that case, the lien of a judgment attaches to the surplus, as if the property had not been designated as an exemtp homestead; but the property cannot be sold by virtue of an execution, issued upon a judgment, as against which it is exempt. After the return of such an execution, the owner of the judgment may maintain a judgment creditor's action, to procure a judgment directing a sale of the property, and enforcing his lien upon the surplus.

Id.; how proceeds to be marshalled when property is sold.

§ 1403. Where the judgment, in a judgment creditor's action, brought as prescribed in the last section, or in any other action affecting the title to an exempt homestead, directs the sale of the property, the court must so marshal the proceeds of the sale, that the right and interest of each person in the proceeds, shall correspond, as nearly as may be, to his right and interest in the property sold. Money, not exceeding one thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, as the property sold was exempt; unless, before the expiration of the year, he causes real property to be designated as an exempt homestead, as prescribed in section one thousand three hundred and ninety-eight of this act; in which case, the exemption ceases, with respect to so much of the money, as was not expended for the purchase of that property; and the exemption of the property so designated extends to every debt, against which the property sold was exempt. Where the exemption of property, sold as prescribed in this section, has been continued after the judgment debtor's death, or where he dies after the sale, and before payment to him of his proportion of the proceeds of the sale, the court may direct that portion of the proceeds, which represents his interest, to be invested, for the benefit of the person or persons, entitled to the benefit of the exemption; or to be otherwise disposed of, as justice requires.

Exemption of real property; how cancelled.

§ 1404. The owner of real property, exempt as prescribed in this article, may, at any time, subscribe a notice, and personally acknowledge the execution thereof, before an officer, authorized by law to take the acknowledgment of a deed, to the effect, that he cancels all exemptions from levy or sale by virtue of an execution, affecting the property, or a particular part thereof, fully described in the notice. The cancellation takes effect, when such a notice is recorded, as prescribed in this article for recording a notice to effect the exemption so cancelled. Any other release or waiver, hereafter executed, of an exemption of real property, allowed by this article, or of an exemption of a homestead, or a private or family burying ground, allowed by the provisions of law heretofore in force, is void. A mortgage, hereafter executed, upon property so exempt, is ineffectual, until the exemption has been cancelled, as prescribed in this section; except that such a mortgage is valid, to the extent of the purchase-money of the same property, secured thereby.

ARTICLE SECOND.

LIEN OF AN EXECUTION UPON PERSONAL PROPERTY; LEVY UPON AND SALE OF PERSONAL PROPERTY; RIGHTS OF INDEMNITORS OF SHERIFF.

SECTION 1405. Personal property bound by execution.
1406. Order of preference among executions.
1407. Id.; when attachments also are issued.
1408. Id.; when issued from court not of record.
1409. Title of bona fide purchasers before levy, not affected.
1410. Execution may be levied upon current money.
1411. Levy upon certain evidences of debt.
1412. Interest of bailor in goods pledged may be sold.
1413. When partners may apply for release of property levied upon.
1414. Undertaking to be given.
1415. Provision, where a warrant of attachment has also been levied, etc.
1416. When the undertaking enures to other judgment creditors.
1417. How partner's interest sold; rights, etc., of purchaser.
1418. Claim of property by a third person, how tried.
1419. Proceedings, if claimant succeeds.
1420. Inquisition not to prejudice claimant's right.
1421. In action against officer, indemnitors may be substituted as defendants.
1422. Notice of application and proofs thereupon.
1423. Terms may be imposed.
1424. When indemnity related to part of property.
1425. Application when officer is joined with indemnitors.
1426. Effect of the order.
1427. Officer to whom indemnity is given, required to give notice of action.
1428. Sale of personal property; how made.
1429. Notices of sale to be posted.

Personal property bound by execution.

§ 1405. The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before.

Order of preference among executions.

§ 1406. Where two or more executions against property are issued, out of the same or different courts of record, against the same judgment debtor, the one first delivered, to an officer, to be executed, has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently delivered; but if a levy upon and sale of personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the letter.*

Id.; when attachments also are issued.

§ 1407. Where there are one or more executions, and one or more warrants of attachment, against the property of the same person, the rule prescribed in the last section prevails, in determining the preferences of the executions or warrants of attachment; the defendant in the warrants of attachment being, for that purpose, regarded as a judgment debtor.

Id.; when issued from court not of record.

§ 1408. But an execution, issued out of a court not of record, or a warrant of attachment, granted in an action pending in a court not of record, if actually levied, has preference over another execution, issued out of any court, of record or not of record, which has not been previously levied.

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Title of bona fide purchasers before levy, not affected.

§ 1409. The title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer, to be executed.

Execution may be levied upon current money.

§ 1410. The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale; except that where it consists of gold coin, he must sell it, like other personal property; unless he is otherwise directed, by an order of a judge, or by the judgment in the particular cause.

Levy upon certain evidences of debt.

§ 1411. The officer, to whom an execution against property is delivered, must levy upon and sell, a bill, or other evidence of debt, belonging to the judgment debtor, which was issued by a moneyed corporation to circulate as money; or a bond or other instrument for the payment of money, belonging to the judgment debtor, which was executed and issued, by a government, state, county, public officer, or municipal or other corporation, and is in terms negotiable, or payable to the bearer, or holder.

Interest of bailor in goods pledged may be sold.

§ 1412. The interest of the judgment debtor in personal property, subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions, upon which the judgment debtor could obtain possession thereof. This section does not apply to property, of which the judgment debtor is unconditionally entitled to the possession.

When partners may apply for release of property levied upon.

§ 1413. Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them, may, at any time before the sale, apply to a judge of the court, or to the county judge of the county, where the seizure was made, upon an affidavit, showing the facts, for an order, directing the officer to release the property, and to deliver it to the applicant.

Undertaking to be given.

§ 1414. Upon such an application, the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect, that he will account to the purchaser, upon the sale to be made by virtue of the execution, of the interest of the judgment debtor in the property seized, in like manner as he would be bound to account to an assignee of such an interest; and that he will pay to the purchaser the balance, which may be found due upon the accounting, not exceeding a sum, specified in the undertaking, which must be not less than the value of the interest of the judgment debtor, in the property seized by the sheriff, as fixed by the judge. The provisions of sections six hundred and ninety-five and six hundred and ninety-six of this act apply to the proceedings, taken as prescribed in this and the last section.

Provision, where a warrant of attachment has also been levied, etc.

§ 1415. Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections six hundred and ninety-three and six hundred and ninety-four of this act, a levy, by virtue of an execution against his individual property, cannot be made upon his interest in the same

property, unless the warrant of attachment has been vacated, or annulled.

When the undertaking enures to other judgment creditors.

§ 1416. Where personal property of a partnership has been released, upon giving an undertaking, as prescribed in the last three sections, if the execution, by virtue of which the levy was made, is set aside, or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment creditor of the same judgment debtor, then having an execution in the hands of the same officer, or of another officer, having authority to levy upon that interest, as if it had been given to obtain a release from a seizure, made by virtue of such an execution.

How partner's interest sold; rights, etc., of purchaser.

§ 1417. Where personal property of a partnership has been so released, the interest of the judgment debtor therein may be sold by the officer; and the purchaser, upon the sale, acquires all that interest, as if he was an assignee thereof. If the purchase-money exceeds the amount of all the executions and warrants of attachment, against the property of the same judgment debtor, of which the officer has notice, and of the lawful fees and charges thereon, the officer must pay the surplus into court, for the benefit of the judgment debtor, or other person entitled thereto.

Claim of property by a third person, how tried.

§ 1418. If personal property, levied upon as the property of the judgment debtor, is claimed, by or in behalf of another person, as his property, the officer may, in his discretion, empanel a jury to try the validity of the claim.

Proceedings, if claimant succeeds.

§ 1419. If, by their inquisition, the jurors find that the property belongs to the claimant, they must also determine its value. Thereupon the officer may relinquish the levy, unless the judgment creditor gives him an undertaking, with at least two sufficient sureties, to the effect, that the sureties will indemnify him, to an amount therein specified, not less than twice the value of the property, as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him, by the claimant, his assignee, or other representative, by reason of the levy upon, detention, or sale of any of the property, by virtue of the execution. If the undertaking is given, the officer must detain the property, as belonging to the judgment debtor.

Inquisition not to prejudice claimant's right.

§ 1420. If the property is found to belong to the defendant, the finding does not prejudice the right of the claimant, to bring an action to recover the property so levied upon, or damages by reason of the levy, detention, or sale.

In action against officer, indemnitors may be substituted as defendants.

§ 1421. Where an action to recover a chattel, hereafter levied upon by virtue of an execution, or a warrant of attachment, or to recover damages by reason of a levy upon, detention, or sale of personal property, hereafter made, by virtue of an execution, or a warrant of attachment, is brought against an officer, or against a person who acted by his command, or in his aid, if a bond or written undertaking, indemnifying the officer against the levy or other act, was given, in behalf of the judgment creditor, or the plaintiff in the warrant, before the action was commenced, the person or persons who gave it, or the survivors, if one or more are dead, may apply to the court, for an order to substitute the applicants, as defendants in the action, in place of the officer, or of the person so acting by his command, or in his aid.

Notice of application and proofs thereupon.

§ 1422. Notice of the application must be given to the attorney for each party to the action. If the defendant has not appeared, notice must be given to him personally. If the pleadings do not sufficiently

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show, that the case is one where the order may be granted, the with respect thereto, must be shown by affidavit, or other com proof. The motion papers must contain a written consent, to be a defendant in the action, executed by each person, who execut instrument of indemnity, unless proof, by affidavit, is furnishe those who do not consent are dead. Each consent must be ac edged or proved, and certified, in like manner as a deed to be re in the county.

Terms may be imposed.

§ 1423. Upon granting the order, the court may, in its disc require the applicants to furnish additional security to the plaint to pay the reasonable expenses of the defendant, necessarily in before the order is granted; or it may impose such other terms, security of either of the original parties, as justice requires.

When indemnity related to part of property.

§ 1424. If the indemnity, given by the applicants, related to only of the property, the court may, in a proper case, direct, t action be divided into two actions; that the applicants be subs as defendants in one, without affecting the other; and that the versy in each action be limited to that part of the property, in to which it is to be continued. Where such an order is made, a application may be subsequently made, in the action which p against the original defendant.

Application when officer is joined with indemnitors.

§ 1425. If the officer, or person acting by his command, or in h is joined as a defendant, with all the persons entitled to make an cation, they may apply for an order to strike out his name, as a d ant. If he is joined as a defendant, with one or more, but no them, those who are not made defendants, may apply to be subs as defendants in his place. In either case, the application is m the same manner, and is subject to the same provisions, as if made as prescribed in section one thousand four hundred and t one of this act.

Effect of the order.

§ 1426. An order, made as prescribed in the last five section not affect the merits of the cause of action, or of the defence, ex far as it limits the controversy to particular property. But if t stituted or remaining defendants recover judgment, they are e to single costs only. If the action is discontinued, or the co dismissed, a new action may be brought, as if the former acti not been brought.

Officer to whom indemnity is given, required to give notice of action.

§ 1427. Where an action is brought, in a case where one or mo sons are entitled to make an application, for an order of substi as prescribed in section one thousand four hundred and twenty this act, the officer, to whom the instrument of indemnity was cannot maintain an action thereupon, against a person entitled to but who has not made, such an application; unless notice of th mencement of the action against the officer, or the person acting command, or in his aid, is given, before the trial thereof, or at le days before judgment by default is taken therein, either to the a whose name is subscribed to the execution or warrant of attac or, personally, to the judgment creditor, or to the plaintiff action in which the warrant of attachment was issued, or to one persons who executed the instrument of indemnity.

Sale of personal property; how made.

§ 1428. Personal property must be offered for sale, in such lo parcels, as are calculated to bring the highest price. Except the officer is expressly authorized, by this article, to sell prope in his possession, personal property shall not be offered for sale, it is present, and within the view of those attending the sale.

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1429. At least six days' previous notice of the time and place of a sale of personal property, by virtue of an execution, must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city, where the sale is made. Notices of sale to be posted.

ARTICLE THIRD.

REDEMPTION AND CONVEYANCE OF REAL PROPERTY; RIGHTS AND LIABILITIES OF PERSONS INTERESTED.

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1430. The expression, "real property", as used in this and the preceding article, includes leasehold property, where the lessee or his To what leasehold property

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this article applies.

assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereupon.

Real property held in trust, when liable to execution.

§ 1431. Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law, for the mode of subjecting it to his debts.

Equity of redemption; when not to be sold.

§ 1432. The judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt, or any part thereof.

Direction to be indorsed on execution.

§ 1433. Where an execution against property, is issued upon a judgment, specified in the last section, to the county where the mortgaged property is situated, the attorney, or other person who subscribes it, must indorse thereupon a direction to the sheriff, not to levy it upon the mortgaged property, or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page, where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied, as the case requires.

Notice of sale of real property; how given.

§ 1434. The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale, as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, if there is one; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.

Property, how described therein. Part may be sold.

§ 1435. In each notice, specified in the last section, the real property to be sold must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or by some other appropriate description. The validity of a sale is not affected by the fact, that the property sold is part only of the property advertised to be sold.

Penalty for irregularity in sale.

§ 1436. A sheriff who sells real property, by virtue of an execution, without having given notice thereof, as prescribed in the last two sections, or otherwise than as prescribed in this chapter, forfeits one thousand dollars to the party injured, in addition to the damages which the latter sustains thereby.

Manner of conducting sale.

§ 1437. Where real property, offered for sale by virtue of an execution, consists of two or more known lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, of any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly. No more real property shall be exposed for sale, than it appears to be necessary to sell, in order to satisfy the execution.

Sheriff to make du-

§ 1438. The sheriff, who sells real property, by virtue of an execu

tion, must make out, subscribe, and acknowledge before an officer authorized to take the acknowledgment of a deed, duplicate certificates of the sale, containing: Duplicate certificates of sale

1. The name of each purchaser, and the time when the sale was made.
2. A particular description of the property sold.
3. The price bid for each distinct parcel separately sold.
4. The whole consideration money paid.

§ 1439. The sheriff must, within ten days after the sale, file one of the duplicate certificates, in the office of the clerk of the county, and deliver another to the purchaser. If there are two or more purchasers, a certificate must be delivered to each. The clerk must immediately record the certificate in a book, kept by him for that purpose, and must index the record, to the name of the judgment debtor. His fees for so doing must be paid by the sheriff, as part of the expenses of the sale. Certificate to be recorded, etc.

§ 1440. The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period, within which it can be redeemed, as prescribed in this article, and the execution of the sheriff's deed. But if the property is not redeemed, and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate, from the time of the sale, for the purpose of maintaining an action for an injury to the property. Title to real property not divested before deed.

§ 1441. The person entitled to the possession of real property, sold by virtue of an execution, as prescribed in the last section, may, during the period therein specified, use and enjoy the same as follows, without being chargeable with committing waste: Rights of holder of the property during intermediate period.

1. He may use and enjoy it in like manner, and for the like purposes, as it was used and enjoyed before the sale, doing no permanent injury to the freehold.
2. He may make necessary repairs to a building, or other erection thereupon. But this subdivision does not permit an alteration in the form or structure of the building, or other erection.
3. He may use and improve the land, in the ordinary course of husbandry; but he is not entitled to a crop, growing thereon, at the expiration of the period of redemption.
4. He may apply any wood or timber on the land to the necessary reparation of a fence, building, or other erection, which was thereupon at the time of the sale.
5. If he actually occupies the land sold, he may take necessary firewood therefrom for use in his household.

§ 1442. If, at any time during the period allowed for redemption, the judgment debtor, or any other person in possession of the property sold, commits, or threatens to commit, or makes preparations for committing, waste thereupon, the supreme court, or any justice thereof, within the judicial district, or the county judge of the county, in which the property, or any part thereof, is situated, may, upon the application of the purchaser, or his assignee, or the agent or attorney of either, and proof, by affidavit, of the facts, grant, without notice, an order, restraining the wrong-doer from committing waste upon the property. Order to prevent waste; when and how applied for.

§ 1443. If the person, against whom such an order is granted, commits waste in violation thereof, after the service upon him of the order, with a copy of the affidavit upon which it was granted, the court or judge, upon proof, by affidavit, of the facts, may grant an order, requir- Proceedings to punish violation of the order.

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ing him to show cause, at a time and place therein specified, why he should not be punished for a contempt.

Mode and extent of punishment.

§ 1444. If, upon the return of the order to show cause, it satisfactorily appears, that the person, required to show cause, has violated the former order, the court or judge may either punish him, as prescribed by law for the punishment of a contempt of a court of record, other than a criminal contempt; or may grant a warrant, directed to the sheriff of the county, reciting the former order, and the violation thereof, and commanding the sheriff to commit the wrong doer to close confinement, for a term specified therein, not more than one year. A person thus committed cannot be admitted to the liberties of the jail.

How warrant, etc., superseded.

§ 1445. The warrant may be superseded, and the prisoner discharged, by an order, in the discretion of the court or judge committing him, upon his executing, to the person who applied for the warrant, an undertaking, in a sum fixed, and with sureties approved, by the court or judge, to the effect, that he will pay any judgment, which the applicant, or his assignee, or other representative, may recover against him, by reason of any waste theretofore or thereafter committed on the property; and upon his paying to the applicant, for the costs and expenses of the proceedings, a sum, fixed by the court or judge.

When and how real property sold may be redeemed.

§ 1446. Within one year after the sale of real property, by virtue of an execution, a person, specified in the next section, may redeem it, by paying to the purchaser, his executor, administrator, or assignee, or to the sheriff who made the sale, for the use of the person so entitled thereto, the sum of money which was paid upon the sale, with interest from the time of the sale, at the rate of ten per centum a year.

By whom such redemption may be made.

§ 1447. The redemption, specified in the last section, may be made, either by the judgment debtor, whose right and title were sold, or by his heir, devisee or grantee, who has acquired, by inheritance, devise, deed, sale, by virtue of a mortgage or of an execution, or by any other means, an absolute title to the property proposed to be redeemed; or, in a case specified in section one thousand four hundred and fifty-eight or one thousand four hundred and fifty-nine of this act, to a portion thereof.

Such redemption avoids the sale.

§ 1448. Upon payment being made, by a person entitled to redeem real property, as prescribed in the last two sections, the sale of the property redeemed, and the certificates of the sale, as far as they relate thereto, become null and void.

When creditor may redeem.

§ 1449. Real property, sold by virtue of an execution, which remains, at the expiration of one year after the sale, unredeemed by the person or persons entitled to redeem it, as prescribed in the last three sections, may be redeemed, within three months after the expiration of the year, by the creditors specified, and upon the terms and in the manner prescribed, in the following sections of this article.

What sum to be paid, etc., when creditor redeems.

§ 1450. In a case specified in the last section, a creditor, having in his own name, or as executor, administrator, assignee, trustee, or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold, may redeem that property, by paying the sum of money, which was paid upon the sale thereof, with interest at the rate of seven per centum a year from the time of the sale, and executing a certificate of satisfaction, as prescribed in section one thousand four hundred and sixty-three of this act.

Redemption by another

§ 1451. Where a creditor has redeemed real property, as prescribed in the last section, any other creditor, who might have redeemed it

from the purchaser, as therein prescribed, may redeem it from the first redeeming creditor, as follows:

Creditor from a redeeming creditor.

1. He must reimburse to the first redeeming creditor, his executor, administrator, or assignee, the sum paid by him to redeem the property, with interest at the rate of seven per centum a year, from the time of his redemption.

2. He must execute a certificate of satisfaction, relating to his judgment or mortgage, in like manner as the first redeeming creditor was required to do.

3. If the judgment or mortgage, by virtue of which the first creditor redeemed, is prior to the judgment or mortgage of the second creditor, the second creditor must also pay to the first creditor, the sum specified in the certificate of satisfaction, executed by him upon his redemption, with interest at the rate of seven per centum a year, from the time of his redemption; unless the first redeeming creditor's judgment or mortgage had ceased, when he redeemed, to be a lien as against the second redeeming creditor; in which case, the latter need not pay any part of the sum, specified in the certificate.

Id.; when second redeeming creditor has the prior lien.

§ 1452. Where the lien of the second redeeming creditor's judgment or mortgage, is prior to that of the first redeeming creditor's judgment or mortgage, so that the former redeems, without paying the sum, specified in the latter's certificate of satisfaction, the latter may, without executing another certificate of satisfaction, again redeem from the former, or from any subsequent redeeming creditor, in a case, where he would have been entitled to redeem, if his first certificate had not been executed; and he has the same rights, with respect to any creditor redeeming from him, as if his first certificate had been executed, when he made his second redemption.

Subsequent redemptions by other creditors.

§ 1453. A third or other creditor, who might have redeemed, as prescribed in the last four sections, may redeem from the second or any other creditor, who has redeemed, in the manner, and upon the terms and conditions, prescribed in the last two sections.

When creditor may redeem after fifteen months.

§ 1454. A creditor, who might have redeemed within fifteen months after the sale, as prescribed in the last four sections, may redeem from any other redeeming creditor, although the fifteen months have elapsed; provided, that he thus redeems within twenty-four hours after the last previous redemption.

When redemption must be made at sheriff's office.

§ 1455. A redemption, made by a creditor, on or after the last day of the fifteen months, must be made at the sheriff's office of the county. The sheriff, or his under-sheriff, or a deputy-sheriff, in his behalf, must attend at the sheriff's office, for that purpose, on the last day of the fifteen months, and on each day thereafter, in which a redemption can be made, during the time when the sheriff's office is required by law to be kept open. In the absence of the sheriff, the redemption may be made, by paying the necessary money, and delivering the necessary papers, to the under-sheriff, or to any deputy-sheriff, present at the sheriff's office. If the term of office of the sheriff, who made the sale, has expired, and he, or his under-sheriff, or a deputy-sheriff authorized, in his behalf, to receive the necessary money and the necessary papers, is not present, the money may be paid, and the papers may be delivered, to the sheriff then in office, or to the under-sheriff or a deputy-sheriff of the latter.

Original purchaser may redeem,

§ 1456. If the purchaser, at the execution sale, of property, which can be redeemed by a creditor, as prescribed in this article, is also a creditor of the judgment debtor, and as such could redeem from a pur-

when also a creditor.

chaser, or a redeeming creditor, he may avail himself of his judgment or mortgage, to redeem from any other redeeming creditor.

Creditor may redeem again under another judgment or mortgage.

§ 1457. The judgment creditor, by virtue of whose execution real property has been sold, cannot avail himself of the judgment, upon which the execution was issued, to redeem the property; nor, except as otherwise specially prescribed in this article, can a creditor, who has once redeemed, avail himself of the same judgment or mortgage, to redeem again. But if either has another judgment or mortgage, which would entitle him to redeem, he may avail himself thereof for that purpose, in the same manner and on the same terms, as any other creditor.

Redemption by person entitled to redeem part.

§ 1458. Where a person, who has an absolute title to, or a judgment or mortgage, which is a lien upon, a distinct parcel only of the real property, sold by virtue of an execution, would be authorized, by this article, to redeem the property, if his title or lien extended to the whole, he may redeem, from a purchaser, the entire property sold, or from a prior redeeming creditor, the entire property redeemed by that creditor; except that if his title or lien extends to a distinct parcel only of one or more parts of the property, which were separately sold, he can redeem, from a purchaser, only the part or parts thus separately sold, in which his distinct parcel is included.

Redemption by owners of undivided shares.

§ 1459. Where two or more persons own undivided shares, as joint tenants, or as tenants in common, in real property, sold by virtue of an execution, or in a distinct parcel thereof, which has been separately sold; each of them may redeem, from the purchaser, as prescribed in sections one thousand four hundred and forty-six and one thousand four hundred and forty-seven of this act, the share or interest, belonging to him, by paying a part of the purchase money, bid for the property, or for that distinct parcel thereof, bearing the same proportion to the whole, as the share or interest, proposed to be redeemed, bears to the property, or distinct parcel separately sold, of which it is a part; together with interest on the sum so paid, from the time of the sale, at the rate of ten per centum a year.

Id.; by creditors having liens on undivided shares.

§ 1460. Where the judgment or mortgage of a creditor, entitled to redeem, is a lien upon an undivided share, specified in the last section, he may redeem, from a purchaser, that undivided share, by paying him the same proportion of the purchase money, which the owner must have paid to redeem it, as prescribed in the last section; or he may redeem, from a prior redeeming creditor, the entire property redeemed by the latter, with like effect and in the same manner, as if his lien attached to the whole.

Right to redeem not affected by agreement.

§ 1461. The sheriff, the purchaser, the judgment creditor or a redeeming creditor, cannot, by his agreement or other act, in any manner impair or prejudice the right of any other person to redeem, as prescribed in this article.

To whom money paid upon redemption.

§ 1462. The money required to be paid by a creditor, in order to effect a redemption of real property, as prescribed in this article, may be paid to the purchaser or creditor, from whom the property is to be redeemed, his executor, administrator or assignee; or it may be paid, for the use of the person so entitled thereto, to the sheriff who made the sale.

Certificate of satisfaction required to effect redemption by creditor.

§ 1463. The certificate of satisfaction, required to be executed by a creditor, in order to effect a redemption of real property, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county; must describe, with reasonable certainty, the

judgment or mortgage under which he redeems, and specify the sum due thereupon; and must state, that the redemption satisfies the judgment or mortgage, in full, or to a specified amount. It must be filed in the county clerk's office, at or before the time when the money is paid to effect the redemption, unless the money is paid to the sheriff; in which case, the certificate must also be delivered, at the time of the payment, to the sheriff, who must file it in the county clerk's office, as prescribed in section one thousand four hundred and sixty seven of this act.

The county clerk, immediately after the execution and recording of the deed, must enter in his docket, the satisfaction, or partial satisfaction, of a judgment specified in a certificate so filed, as required by law, when a judgment is collected, by virtue of an execution. If a mortgage, specified in the certificate, is recorded in his office, he must cancel and discharge the mortgage of record, if it is satisfied by the certificate; or, if it is only partially satisfied, he must make a minute of the partial satisfaction, upon the record thereof. If the property mortgaged is situated in a county, in which there is a register, the county clerk must transmit a certified copy of the certificate to the register, who must, in like manner, cancel and discharge the mortgage of record, or make a minute of the partial satisfaction thereof. The clerk's and register's fees, for performing the services specified in this section, must be paid by the sheriff; who may require the person entitled to a deed to pay him the amount thereof, before the deed is delivered.

What evidence a redeeming judgment creditor must furnish.

§ 1464. In order to entitle a creditor by judgment to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, as the case requires, the following evidence of his right:

1. A copy of the docket of the judgment, under which he claims the right to redeem, duly certified by the county clerk.

2. Each assignment of the judgment, which is necessary to establish his right. An assignment so filed or delivered must be acknowledged or proved, and certified, in like manner as a deed to be recorded, or the execution thereof must be proved, by the affidavit of the creditor, or of a witness thereto; unless it has been filed, and entered, as prescribed in article third of title first of chapter eleventh of this act, in which case, a certified copy thereof must be filed or delivered.

3. An affidavit, made by him, or his attorney or agent, stating truly the sum remaining unpaid on the judgment, at the time of claiming the right to redeem.

Id.; as to mortgage creditor.

§ 1465. In order to entitle a creditor by mortgage to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, the following evidence of his right:

1. A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk or register of the county.

2. Each assignment of the mortgage, which is necessary to establish his right, acknowledged or proved, and certified, as prescribed in the last section for an assignment of a judgment, unless it has been recorded; in which case a certified copy of the record must be filed or delivered.

3. An affidavit, made by him, or by his attorney or agent, stating truly the sum remaining unpaid on the mortgage, at the time of claiming the right to redeem.

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Id.; as to executor or administrator.

§ 1466. In either of the cases specified in the last two sections, if the person, proposing to redeem, claims to be entitled so to do, by reason of his being an executor or administrator of a person, who, if living, would be entitled to redeem, he must file or deliver, with the other papers therein prescribed, a certified copy or a sworn copy of his letters testamentary, or letters of administration.

Officers to keep papers open to inspection; when to file them.

§ 1467. The sheriff to whom one or more papers, specified in the last four sections, are delivered, must keep them open, at all reasonable times during the period allowed for redemption, to the inspection of all persons interested. He must have all those papers at the sheriff's office, at the times when he is required to attend thereat, for the purpose of enabling creditors to redeem, as prescribed by law; and he must file them in the county clerk's office, within three days after the execution of the deed.

When redemption takes effect.

§ 1468. A redemption by a creditor is effected, only when he has paid all the money required to be paid, and filed or delivered all the papers, required to be filed or delivered, as prescribed in this article; and a waiver of any of those requirements is void, as against a person who is entitled subsequently to redeem. Where a redemption is thus effected, it vests in the redeeming creditor all the right, title, and interest, which the purchaser acquired by the sale.

Certificate to be given, when redemption made.

§ 1469. Where a redemption is made, as prescribed in this article, the officer or other person, to whom money is paid, or a paper is delivered, for the purpose of effecting the redemption, must execute and deliver, to the person paying the money or delivering the paper, a certificate, stating all the facts which transpired before him, with respect to the redemption.

Certificate may be acknowledged and recorded.

§ 1470. Such a certificate may be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds, has the same effect, as against subsequent purchasers and incumbrancers, as the recording of a conveyance.

When and by whom conveyance to be executed.

§ 1471. Immediately after the expiration of fifteen months from the time of sale; except where a redemption has been made on the last day of the fifteen months, and, in that case, immediately after the expiration of twenty-four hours from the last redemption; the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee, or assignee. The deed conveys to the grantee therein the right, title, and interest, which were sold by the sheriff.

To whom conveyance to be executed.

§ 1472. If any part of the property remains unredeemed by a creditor, it must be conveyed, by the sheriff, to the purchaser upon the sale, except where the certificate of sale has been assigned; in which case, it must be conveyed to the last assignee. Any part or parts of the property sold, which have been rendered* by a creditor, must be conveyed by the sheriff, to the last redeeming creditor, except where he has assigned the certificate of redemption, or has executed any other assignment of his right, title, and interest in the property redeemed by him; in which case, it must be conveyed to the last assignee.

When conveyance made to executor

§ 1473. Where a person, entitled to a deed, dies before the delivery

* So in the original.

of the deed, the sheriff must execute and deliver the deed to his executor or administrator. The property so conveyed must be held, in trust for the use of the heirs or devisees of the decedent, subject to the dower of his widow, if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized. or administrator; effect thereof.

§ 1474. Before an assignee, or his executor or administrator, is entitled to a deed, as prescribed in the last two sections, each assignment, under which the deed is claimed, must be acknowledgod or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated, and must be filed in the office of the clerk of that county. Assignment must be acknowledged and filed.

§ 1475. Where a sheriff dies, is removed from office, or becomes otherwise disqualified to act, at any time after making a sale of real property, by virtue of an execution, the property, or a distinct parcel thereof, may be redeemed, by paying the necessary money, and delivering the necessary papers, to his under-sheriff, who must also execute and deliver the proper deed or deeds of property, not redeemed by the judgment debtor, his heir, devisee, or grantee. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the property may be redeemed, by paying the necessary money, and delivering the necessary papers, to the sheriff's successor in office, who must also execute and deliver the proper deed or deeds. The under-sheriff or the sheriff's successor, as the case requires, possesses all the powers, and is subject to all the duties and liabilities, of the sheriff who made the sale, touching the redemption and conveyance of property sold, and the proceedings relating thereto: and each provision of law, regulating those proceedings, and applicable to the sheriff who made the sale, is applicable to his under-sheriff or successor. This section applies where a sale was made, either before or after this act takes effect. Under sheriff or successor to act, if sheriff dies.

§ 1476. Where real property is sold, by virtue of an execution, by the under-sheriff or a deputy-sheriff, in behalf of the sheriff, money required to be paid, or a paper required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, may be paid or delivered, either to the sheriff, or to the under-sheriff or deputy-sheriff, who made the sale. Money may be paid, etc., to under sheriff, or deputy sheriff, who sold property.

§ 1477. Where real property is sold, by virtue of an execution, by a person specially appointed by the court, as prescribed in section one thousand three hundred and sixty-two or section one thousand three hundred and eighty-eight of this act, it may be redeemed, as prescribed in this article, as if it had been sold by the sheriff, except as follows: Application of this article to sale by coroner, or person specially appointed, etc.

1. Money, required to be paid, or a paper, required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, must be paid to the officer who made the sale; unless the person entitled to redeem, his agent or attorney, files with the clerk of the county, with the paper or papers required to be filed, or to be delivered to the sheriff, for the purpose of effecting the redemption, his affidavit, to the effect, that the officer is dead; or has been removed; or, where he is a coroner, that he is no longer in office; or that after diligent search, the affiant has been unable to find him within the county; in which case, the money may be paid into court, by paying

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it to the county treasurer, to the credit of the cause, with like effect, as where it is paid to the sheriff, after a sale by the latter.

2. The provisions of section one thousand four hundred and fifty-five of this act, apply to a redemption, upon a sale made as prescribed in this section; and the officer, who sold the property, must attend, as the sheriff is therein required to attend. If he is not present, the redemption may be effected, as prescribed in that section, for redemption in a case, where the term of office of the sheriff, who made the sale, has expired.

Id.; where coroner or person appointed dies, etc.

§ 1478. If, when the period for redemption expires, a coroner, or a person specially appointed by the court, who has sold real property, by virtue of an execution, is dead, or has been removed, or, in the case of a coroner, if he is no longer in office, the court must, upon the application of a person entitled to a deed, appoint a person, to execute the deed accordingly.

ARTICLE FOURTH.

Remedies for Failure of Title to Real Property sold, and to enforce Contribution.

Section 1479. When evicted purchaser may recover purchase-money.
1480. Remedy of judgment creditor thereupon.
1481. Contribution between owners of real property.
1482. Id.; when part owner redeems.
1483. Order of contribution.
1484. Contribution, how enforced by means of original judgment.
1485. Requisites to preserve the lien.
1486. Entry upon the docket.

When evicted purchaser may recover purchase-money.

§ 1479. The purchaser of real property, sold by virtue of an execution, his heir, devisee, grantee, or assignee, who is evicted from the possession thereof, or against whom judgment is rendered, in an action to recover the same, may recover the purchase-money, with interest, from the person for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence, either:

1. Of any irregularity in the proceedings concerning the sale; or

2. Of the judgment, upon which the execution was issued being vacated or reversed, or set aside for irregularity, or error in fact.

Remedy of judgment creditor thereupon.

§ 1480. Where final judgment is rendered, against the defendant, in an action specified in subdivision first of the last section, the judgment, by virtue of which the sale was made, remains, in his favor, valid and effectual against the judgment debtor therein, his executor, administrator, heir or devisee, for the purpose of collecting the sum paid on the sale, with interest. He may accordingly have a further execution upon that judgment; but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment, or otherwise, whose title or whose incumbrance accrued, before the actual levy thereof.

Contribution between owners of real property.

§ 1481. Where the real property of two or more persons is liable to satisfy a judgment, and the whole of the judgment, or more than a due proportion thereof, has been collected, by a sale of the real property of one or more of them, by virtue of an execution issued upon the judgment; the person so aggrieved, or his executor or administrator, may

maintain an action, to compel a just and equal contribution by all the ersons, whose real property ought to contribute as prescribed in the ext section but one.

Id.; when part owner redeems.

§ 1482. Where the heir, devisee, or grantee, of a judgment debtor, aving an absolute title to a distinct parcel of real property, sold by irtue of an execution, redeems, as prescribed in section one thousand our hundred and fifty-eight of this act, the property sold, or any part r parts thereof separately sold, which include his property; he may, n like manner, maintain an action, to compel a just and equal contri- ution by those, who own the residue of the property thus redeemed.

Order of contribution.

§ 1483. Where an action is brought, as prescribed in the last two ections, the real property is liable to contribution in the following rder:

1. If it comprises different undivided shares or distinct parcels, which have been conveyed by the judgment debtor, they are liable in uccession, commencing with the portion last conveyed.

2. If it comprises different undivided shares or distinct parcels, which have been sold by virtue of two or more executions, they are liable in succession, commencing with the portion sold under the last and youngest judgment.

3. If it comprises different undivided shares or distinct parcels, some of which have been conveyed by the judgment debtor, and some of which have been sold by virtue of one or more executions, they are respectively liable in succession, according to the order prescribed in the first and second subdivisions of this section.

Contribution, how enforced by means of original judgment.

§ 1484. For the purpose of enforcing contribution, as prescribed in the last section, the court, in which the action is brought, may, and in a proper case, must, permit the plaintiff to use the original judgment, and to collect, by an execution issued thereupon, out of any real prop- erty subject to the lien thereof, the sum which ought to be contributed by that property. For that purpose, the lien of the original judgment, upon that real property, when preserved, as prescribed in the next sec- tion, continues, for the term prescribed in sections one thousand two hundred and fifty-one and one thousand two hundred and fifty-five of this act, to the extent of the sum, which ought to be so contributed, notwithstanding the payment made by the party seeking contribution.

Requisites to preserve the lien.

§ 1485. The lien of the original judgment may be preserved, as pre- scribed in the last section, by filing, in the clerk's office of the county where the real property is situated, within twenty days after the pay- ment, for which contribution is claimed, an affidavit, in behalf of the person aggrieved, stating the sum paid, and his claim to use the judg- ment for the reimbursement thereof, with a notice, requiring the clerk to make the entries specified in the next section. But the lien is not preserved, as against a grantee or mortgagee in good faith, for a valu- able consideration, without notice, and before the entries are actually made.

Entry upon the docket.

§ 1486. On filing the affidavit and notice, the clerk must make, upon the docket of the judgment, an entry, stating the sum paid, and that the judgment is claimed to be a lien to that amount. Where it is desired to preserve the lien, upon property situated in two or more counties, a similar affidavit and notice must be filed with, and a similar entry made by, the clerk of each county.

TITLE III.

Execution against the person.

SECTION 1487. In what cases execution may be issued against the person.
1488. Id.; against a woman.
1489. When execution against property must be first issued.
1490. Simultaneous executions not allowed against property and person.
1491. Id.; when debtor has been taken.
1492. New execution may issue after escape.
1493. Id.; when debtor dies charged in execution.
1494. Id.; when creditor discharges debtor after thirty days.
1495. New execution not to be enforced against real property sold, etc.

In what cases execution may be issued against the person.

§ 1487. Where a judgment can be enforced by execution, as prescribed in section one thousand two hundred and forty of this act, an execution, against the person of the judgment debtor, may be issued thereupon, subject to the exception specified in the next section, in either of the following cases:

1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action.

2. In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor where it has not been vacated.

Id.; against a woman.

§ 1488. But an execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, has not been vacated.

When execution against property must be first issued.

§ 1489. Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail, by virtue of an execution against his person, issued in another action, or of an order of arrest or a surrender by his bail, in the same action, an execution against his person cannot be issued, until an execution against his property has been returned, wholly or partly unsatisfied. If he is a resident of the State, the execution against his property must have been issued to the county where he resides.

Simultaneous executions not allowed against property and person.

§ 1490. An execution against the person of the judgment debtor cannot be issued, without leave of the court, while an execution against his property, issued in the same action, remains unreturned; and an execution against his property cannot be issued, without leave of the court, while an execution against his person, issued in the same action, remains unreturned.

Id.; when debtor has been taken.

§ 1491. Where a judgment debtor has been taken, and remains in custody, by virtue of an execution against his person, another execution cannot be issued, in the same action, against his person or his property, except in a case specially prescribed by law.

New execution may issue after escape.

§ 1492. If a judgment debtor escapes, after having been taken, by virtue of an execution against his person, he may be retaken, by virtue of a new execution against his person; or an execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned, without his having been taken.

Id.; when debtor dies charged in execution.

§ 1493. Where a judgment debtor, who has been taken by virtue of an execution against his person, dies while in custody, a new execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned without his having been taken.

Id.; when creditor discharges

§ 1494. At any time after a judgment debtor has remained in custody, by virtue of an execution against his person, for the space of

thirty days, the judgment creditor may serve upon the sheriff a written notice, requiring him to discharge the judgment debtor from custody, by virtue of the execution. Whereupon the sheriff must discharge the judgment debtor, and return the execution accordingly. After service of such a notice, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but after his discharge, the judgment creditor may otherwise enforce the judgment, as if the execution, from which he was discharged, had been returned, without his having been taken.

Debtor after thirty days.

§ 1495. A new execution against property, issued in a case specified in the last two sections, cannot be enforced against an interest in real property, including a chattel real, which was purchased, in good faith, from the judgment debtor, after the recovery of the judgment upon which it is issued; or which was sold by virtue of an execution, issued upon a previous or subsequent judgment.

New execution not to be enforced against real property sold, etc.

§ 1496. This act shall take effect on the first day of May, eighteen hundred and seventy-seven.

CHAPTER 542, OF 1879.

§ 1. (Contains the amendments to the Code of Civil Procedure, in accordance with which the foregoing sections have been amended.)

§ 2. But the amendments, made to this act by section five hundred and forty-nine and five hundred and fifty, shall not apply to an action commenced; the amendments to sections eight hundred and seventy-two, eight hundred and seventy-three, and eight hundred and eighty, shall not apply to a case where an order for an examination has been made; the amendment to section ten hundred and eleven shall not apply to a case where a stipulation has been given, and the amendment to section thirteen hundred and eighty shall apply only to a case where the decedent dies, after this act takes effect. Nor shall any amendment made by this act invalidate or impair any proceeding taken.

CHAPTER 449.

AN ACT explaining, defining and regulating the effect and application of, and otherwise relating to, the act passed at this session of the Legislature, entitled "An act relating to courts, officers of justice, and civil proceedings."

Passed June 2, 1876; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Code of Remedial Justice.

SECTION 1. The act, passed at this session of the Legislature, entitled "An act relating to courts, officers of justice, and civil proceedings," constitutes a portion of the new revision of the statutes; and may be styled, in any act of the Legislature, or proceeding in a court of justice, or whenever it is otherwise referred to as "The Code of Remedial Justice."

Constitution.

§ 2. In construing that act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

"Superior city courts."

1. The "superior city courts" are, collectively, the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo, and the city court of Brooklyn.

"Mandate."

2. The word, "mandate," includes a writ, process, or other written direction issued pursuant to law, out of a court, or made pursuant to law, by a court, or a judge thereof, or by a person acting as a judicial officer, and commanding a court, board or other body, or an officer, or other person, named or otherwise designated therein, to do, or to refrain from doing, an act therein specified.

"Judge."

3. The word, "judge," includes a justice, surrogate, recorder or other judicial officer, authorized or required to act, or prohibited from acting in the matter or thing referred to, in the provision in which that word is used.

"Clerk."

4. The word, "clerk," signifies the clerk of the court, wherein the action or special proceeding is brought, or wherein, or by whose

authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the Supreme Court, it signifies the clerk of the county where the action or special proceeding is triable, or the act is to be done.

"Report." 5. The word "report," when used in connection with a trial, or other inquiry, or a judgment, means a referee's report; and the word, "decision," when used in the same connection, means the decision of the court upon a hearing, or the trial of an issue, before the court, without a jury.

"Action of ejectment." 6. An "action of ejectment" is an action to recover the possession of some specific real property.

"Judgment creditor's action." 7. A "judgment creditor's action" is an action brought by a judgment creditor, pursuant to the provisions of sections thirty-eight and thirty-nine of title two of chapter one of part three of the Revised Statutes, or otherwise to aid in the collection of a judgment for a sum of money, or directing the payment of a sum of money.

"Personal injury." 8. A "personal injury" includes libel, slander, criminal conversation, seduction, and malicious prosecution; also, an assault, battery, false imprisonment, or other actionable injury to the person of the plaintiff, or his or her wife, husband, child, or servant.

"Injury to property." 9. An "injury to property" is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract.

"Requisition to replevy." 10. Personal property taken by a sheriff, in an action to recover the possession thereof, pursuant to the plaintiff's claim of the immediate delivery thereof, is said to be "replevied"; and the indorsement in writing, upon the affidavit, in behalf of the plaintiff, requiring the sheriff to take the property from the defendant, and deliver it to the plaintiff, is styled "a requisition to replevy." Such a requisition is deemed to be the mandate of the court, in which the action is brought.

Annulment of a warrant of attachment. 11. A warrant of attachment is said to be annulled when the action, in which it was granted, abates or is discontinued; or a final judgment rendered therein in favor of the plaintiff, is fully paid; or a final judgment is rendered therein in favor of the defendant. But, in the latter case, a stay of proceedings suspends the effect of the annulment, the reversal or vacating of the judgment revives the warrant.

"Judgment creditor." 12. The term, "judgment creditor," signifies the person who is entitled to collect, or otherwise enforce, for his own immediate benefit, a judgment for a sum of money or directing the payment of a sum of money.

"Lunatic." 13. The words, "lunacy," and "lunatic," embrace every description of unsoundness of mind, except idiocy.

"Distinct parcel." 14. A "distinct parcel" of real property is a part of the property, which is or may be set off by boundary lines, as distinguished from an uncertain or undivided share or interest therein.

"Territory." 15. The word, "territory," when applied to a portion of the United States, without the State, signifies a portion thereof where an organized territorial government exists, and includes the District of Columbia.

"Domestic" and "foreign corporations." 16. A "domestic corporation" is a corporation created by or under the laws of the State. A "foreign corporation" is a corporation created by or under other laws.

"Action for dower." 17. The term, "action for dower," includes all proceedings, authorized by the existing laws, to be taken, by or in behalf of a widow, for

the admeasurement of her dower, or to recover the property ad
ured, or the rents and profits thereof.

"Trial juror" and "trial jury."

§ 3. The terms, "trial juror," and "trial jury," as used in tha
are respectively equivalent to the terms, "petit juror," and petit
heretofore used in the Constitution and laws of the State. The

"Notify."

"notify," as used in that act, with respect to procuring the atten
of a juror, is equivalent to the word, "summon," as heretofore u
the like connection, in the same Constitution and laws.

"Action." "Judgment." "Special proceeding." "Order."

§ 4. In that act, and in this act, the word "action," refers to
action; the word, "judgment," to a judgment in such an actio
term "special proceeding," to a civil special proceeding; and the
"order," to an order made in such an action or special procee
except where a contrary intent is expressly declared in the pro
containing the word or term, or plainly apparent in the context th

Application and effect of certain portions of the act.

§ 5. The application and effect of certain portions of that a
declared and regulated as follows, except that where a particula
vision, included within a chapter or a portion of a chapter, specif
a subdivision of this section, expressly specifies the courts, pers
proceedings, affected thereby, that provision is to be deemed exc
from the application and effect, prescribed in the subdivision:

Chapter second.

1. In chapter second, the prisoners referred to are civil prisoner

Chapter third.

2. In chapter third, the provisions of the sections three hundre
three, three hundred and four, three hundred and five and three
dred and six, apply to trial jurors upon the trial of an indictm
other criminal cause, as prescribed in subdivision seventh of th
tion, with respect to the application of titles third and fourth of
ter tenth.

Chapter fifth.

3. In chapter fifth, sections four hundred and fifty, four hundre
fifty-four, four hundred and fifty-five and four hundred and
eight, apply to an action commenced, in any court of the State,
after the first day of May, eighteen hundred and seventy-seven.

Chapters fifth and sixth.

4. The remainder of chapter fifth, and the whole of chapter
apply only to an action commenced, on or after the first day of
eighteen hundred and seventy-seven, in the Supreme Court, a su
city court, the marine court of the city of New York, or a county
If, before that date, in an action brought in either of those cou
summons has been served upon one or more of two or more defen
or an order for the service of a summons by publication has been
chapters fifth and sixth do not apply to that action.

Chapter seventh.

5. Chapter seventh, excluding section five hundred and forty-
and article first of title fourth thereof, applies only to an action i
of the courts specified in subdivision fourth of this section, in whi
application for an order of arrest, an injunction, or a warrant of a
ment, is made on or after the first day of May, eighteen hundre
seventy-seven. Article first of title fourth of that chapter applie
to proceedings taken, as therein prescribed, on or after that date.

Chapter eight.

6. Chapter eight applies only to the proceedings taken, on or
the first day of May, eighteen hundred and seventy-seven, in an
or special proceeding in one of the courts specified in subdivision
of this section; except that section seven hundred and twenty
seven hundred and twenty-six, and seven hundred and twenty-
apply to all courts of record, sections seven hundred and twenty-
seven hundred and twenty-nine, and seven hundred and thirty,
ceedings in any court or before any officer or body, and sections
hundred and sixty-four and seven hundred and sixty-five, to all c

7. In chapter tenth, titles first, second, fifth and sixth, apply only to proceedings taken, on or after the first day of May, eighteen hundred and seventy-seven, in one of the courts specified in subdivision fourth of this section. Titles third and fourth of that chapter apply only to jurors drawn for a term of a court commencing not less than twenty days after the first day of May, eighteen hundfed and seventy-seven, subject to that qualification, they apply to jurors selected under the existing laws, and the lists and ballots prepared accordingly, until new jurors are selected, and new lists and ballots are prepared, as prescribed in those titles. The same titles, excluding article third of title third, apply equally to a criminal and civil action or special proceeding, and to a court of criminal and of civil jurisdiction. A jury for the trial of an indictment, or other criminal cause, at a term of a court of record, commencing on or after the twenty-first day of May, eighteen hundred and seventy-seven, must be procured from the trial jurors selected, drawn and noticed, as prescribed in this act, and in those titles, for the term of the court at which it is triable, including the talesmen or additional jurors procured as prescribed therein; and the same must be tried by the jury so formed, but the existing laws. relating to challenges or disqualifications of petit jurors in a criminal cause, or prescribing the cases where talesmen or additional petit jurors must be summoned in a criminal cause, remain unaffected by those titles, and are applicable to the proceedings taken as therein prescribed, and to the trial jurors therein specified. Those titles do not affect any provision of the existing laws, relating to grand jurors or grand juries; except that where such a provision refers to the listsof petit jurors; the ballots containing their names, the box or boxes in which those ballots are deposited or contained, the selecting, drawing, summoning, or empanelling of petit jurors, the imposition of a fine upon a petit juror, or the enforcement, reduction, or remission thereof, it is deemed to refer to the same subject, as provided for in those titles, in like manner as it refers to the existing laws relating thereto. Title third does not affect any special provision of law remaining in force after the first day of May, eighteen hundred and seventy-seven, whereby trial jurors are directed to be procured, for a particular court of record, from a particular locality, or whereby a county is divided into two or more jury districts, and the selecting, drawing, summoning, or attendance of jurors from the particular locality, or the different jury districts is regulated; but each of those provisions becomes applicable to and affects the selecting, drawing, notifying, or attendance of jurors, as prescribed in that title, in like manner as it now applies to and affects the existing laws, upon the same subject. So much of the provisions of title fourth, as relates to the remission or enforcement of a fine imposed upon a trial juror, applies to a fine imposed upon a grand juror, as prescribed in the existing laws. Chapter tenth.

8. In chapter eleventh, articles first and second of title first, and the whole of title third, apply only to proceedings in one of the courts specified in subdivision fourth of this section, taken on or after the first day of May, eighteen hundred and seventy-seven, but where an action has been commenced in either of those courts, before that date, a judgment by default must be taken therein, as prescribed by the existing laws. Chapter eleventh.

9. Chapter twelfth does not apply to an appeal from a surrogate's court; and does not affect the existing laws, touching the review of proceedings in a criminal cause. Chapter twelfth.

Chapter inoperative.

10. Chapter thirteenth applies only to an execution issued on or after the first day of May, eighteen hundred and seventy-seven, out of a court of record, other than an execution issued out of such a court, and directed, pursuant to law, to a constable or marshal; and to sales and other proceedings, by virtue of an execution directed to a sheriff, and delivered to him, after that date. Sections one thousand four hundred and thirteen and one thousand four hundred and fourteen, and sections one thousand four hundred and seventeen to one thousand four hundred and twenty-seven, both inclusive, apply only to a case where such an execution is issued out of one of the courts specified in subdivision fourth of this section; or where a warrant of attachment has been granted in an action brought in one of those courts. Title third of that chapter applies only to an execution issued upon a judgment rendered in one of those courts.

Qualifications.

§ 6. The application of that act, as prescribed in the last preceding section of this act, is subject to the following qualifications:

Not to impair effect of prior proceedings.

1. That act does not render ineffectual or otherwise impair any proceedings in an action or special proceeding to which it applies, taken, pursuant to the existing laws, before the first day of May, eighteen hundred and seventy-seven; and where any provision contained in it would render ineffectual, or otherwise impair, such a proceeding, the subsequent proceedings must be taken as prescribed in the existing laws, as far as it is necessary, for the purpose of avoiding such a result.

Operates, in certain cases, as an amendment of the Code of Procedure.

2. With respect to an action or special proceeding, commenced before the first day of May, eighteen hundred and seventy-seven; or with respect to any provision of the existing laws, remaining unrepealed after it takes effect, whereby the proceedings in an action or special proceeding are specially prescribed, or otherwise regulated; or with respect to the costs, fees, or expenses in an action or special proceeding; it has the same effect as if it was an act amending the Code of Procedure.

Proceedings at terms of county courts.

3. Each provision of that act, conferring power upon, or authorizing or requiring a proceeding to be taken at a general, special or trial term, which is made, by the terms of this act, applicable to a county court, is to be construed as applying to any term of the county court, held pursuant to an appointment made as prescribed by law.

Marine court of the city of New York.

§ 7. The application of that act to the marine court of the city of New York is subject to the following qualifications:

1. It does not confer upon the marine court, or a justice thereof, power to grant an order of arrest, an injunction order, or a warrant of attachment, in a case where the same cannot be granted under the existing laws; or take away the power of that court, or of a justice thereof, to grant such an order or warrant, in a case where the same can be granted under the existing laws; or otherwise affects the jurisdiction or power of that court, or a justice thereof, under the existing laws, except so far as the latter are inconsistent with, or superseded by, title fourth of chapter third of that act.

2. It does not affect the proceedings in that court in "marine causes," as regulated by the existing laws.

3. It does not affect any provision of the existing laws, exclusively applicable to the proceedings in that court, prescribing, or authorizing a justice of the court to prescribe, the time within which an act must or may be done, or must or may be required to be done.

4. It does not affect an appeal to or from the general term of that court.

5. It does not confer upon that court power to refer a cause or matter, in a case where that power is not conferred upon it by the existing laws.

Construction of certain provisions of existing laws.

§ 8. A provision of the existing laws, relating to the proceedings in an action in a court, other than one of those specified in subdivision fourth of section five of this act, or to a special proceeding before any judge or other officer, which assimilates the proceeding, by general language, or by reference to another provision of the existing laws, to a proceeding in the Supreme Court, or before a justice thereof, or, generally, to a proceeding in other courts of record, or before a judge thereof, is to be construed, where the corresponding proceeding is prescribed and regulated in the act specified in section one of this act, as referring to the provisions of the latter, prescribing and regulating the same.

Publication of a summons.

§ 9. Each provision of that act, requiring the publication of a summons, notice, or other paper, in one or more newspapers, or authorizing or requiring a court, or a judge, to designate one or more newspapers, in which such a publication must be made, is to be construed as not affecting any special provision of the existing laws, prescribing one or more particular newspapers, in which such publication must be made, in a particular locality, or in a particular case.

Actions against mayor, aldermen, etc., of the city of New York.

§ 10. That act does not affect any provision of the existing laws, which is applicable exclusively to an action against the mayor, aldermen and commonalty of the city of New York, including the recovery, entry, or collection of a judgment in such an action.

"Security."

§ 11. Each provision of that act, requiring the plaintiff in an action to give security, for the purpose of obtaining an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding in the action, or allowing the court, or a judge, to require such security to be given, is to be construed as excluding an action brought by the People of the State, or by a domestic municipal corporation, or by a public officer, in behalf of the People, or of such a corporation.

Transmission of papers.

§ 12. Each provision of that act, requiring a judge, clerk, or other officer, to transmit a paper to another officer, for the benefit of a particular person, is to be construed as requiring the transmission only upon the request of the person so to be benefited, and upon payment by him of the fees allowed by law therefor, if any, and of the fees allowed by law, for a copy, or certificate, connected therewith; together with the reasonable expenses of the transmission.

Appointment of terms and designation of judges.

§ 13. That act does not affect the appointment of a term, or the designation of one or more judges to hold a term, made, pursuant to the existing laws, until new terms are appointed, or one or more judges are newly designated, as prescribed in that act.

§ 14. It does not create a vacancy in any office or employment, designated or referred to therein, by the title or description thereof, contained in the existing laws, or by another title or description; nor does it affect the existing laws relating to the amount, or the time or the mode of payment, of the compensation of an officer or employe, so designated or referred to, who is in office or employed when it takes effect; except that where the tenure of his office or employment is not prescribed in that act, he may be removed at pleasure by the court, officer, or officers, authorized by its provisions to appoint a person to discharge the same duties. Until he is removed, or his office or place becomes otherwise vacant, the provisions of that act apply to him, and to the

Officers and employes.

discharge of his duties. The officers or employes, styled in section ninety-three of that act "attendants," include those styled, in the existing laws, "officers;" those styled in section ninety-five "attendants and messengers," include those styled, in the existing laws, "officers and attendants;" those styled in section two hundred and eighty-eight "special deputy clerks and other assistants," include those styled, in the existing laws, "deputies" and "clerks employed by the clerk," and all the clerks and other employes, in the office of the clerk of the court of common pleas for the city and county of New York, specified in section two of chapter six hundred and sixty-four of the laws of eighteen hundred and sixty-nine, or actually employed, pursuant to the existing laws, to do clerical duty in the office of the clerk of that court, or the clerk of the superior court of the city of New York; those styled in section three hundred and nine "special deputy clerks and assistants in the clerk's office," include those styled, in the existing laws, "deputies," of whom the deputy clerk of the city court of Brooklyn, specified in section two hundred and eighty-four, is one; those styled, in section three hundred and twenty-eight of that act, "assistants," include those styled, in the existing laws, "assistant clerks." This enumeration shall not be construed to exclude, from the provisions of this section, any other officer or employe, performing the duties of an office or employment, which is designated or referred to in that act by a title or description other than that which it bears in the existing laws.

"Existing laws."

§ 15. The term "existing laws," as used in this act, designates the statutes of the State remaining unrepealed on the thirtieth day of April, eighteen hundred and seventy-seven.

Printing and publication of this act and "The Code of Remedial Justice."

§ 16. This act and the Code of Remedial Justice shall not be printed or published for the use of the State, or of any State Department, or State officer, or otherwise in any manner at the expense of the State, except in the volumes containing the laws of this session to be printed and published as prescribed by law; they shall be printed in one volume, which shall contain no other law passed at this session; nor shall they be printed or published in any newspaper at the expense of the State, or of any county. All laws relating to printing, distributing or publishing any of the Statutes of the State at the public expense, shall be deemed inapplicable to those two acts, except as respects the printing, publication, and distribution thereof, in the volumes containing the laws of this session.

§ 17. This act shall take effect immediately.

SUSPENDING ACT.

CHAP. 318.

ACT to suspend the operation of parts of chapters four ndred and forty-eight and four hundred and forty-nine the laws of eighteen hundred and seventy-six, to con- ue in force the laws superseded thereby, and to regulate ceedings in civil actions.

Passed May 22, 1877.

People of the State of New York, represented in Senate and Assem- enact as follows:

ION 1. The operation of all the provisions of chapters four hun- nd forty-eight and four hundred and forty-nine of the laws of en hundred and seventy-six, except sections three hundred and o three hundred and six, both inclusive, and sections one thou- nd twenty-seven to one thousand one hundred and eighty, both ve, of said chapter four hundred and forty-eight, and so much of isions two and seven, of section five of said chapter four hundred rty-nine, as applies to said sections, is hereby suspended until st day of September, eighteen hundred and seventy-seven, when me shall again go into and remain in full force and effect.

Any summons actually issued in an action on or after the first May, eighteen hundred and seventy-seven, and before this act effect, shall not be deemed invalidated or affected in any manner provisions of this act, and the same may be served upon any of fendants, and judgment by default for want of appearance or r may be taken as if this act had not been passed; or if the de- nt answers, the proceedings in the action to the service of the leading therein shall be the same as if this act had not been l.

No proceeding in an action or a special proceeding, taken as ibed in chapter four hundred and forty-eight of the laws of en hundred and seventy-six, on or after the first day of May, en hundred and seventy-seven, and before this act takes effect, be invalidated or impaired by this act, but the subsequent pro- ngs, except as otherwise provided in the sections mentioned in

section one of this act, or as otherwise expressly prescribed in the last preceding section, shall conform, as nearly as may be, to the provisions of law regulating proceedings in actions and special proceedings as they existed on the thirtieth day of April, eighteen hundred and seventy-seven, and the court shall, upon proper application, allow, without costs, any amendment or other proceeding which may be necessary for that purpose.

§ 4. All actions or special proceedings commenced after this act takes effect, and all proceedings after this act takes effect in an action or special proceeding commenced before this act takes effect, shall be conducted as prescribed by law for that purpose, in force on the thirtieth day of April, eighteen hundred and seventy-seven, until the first day of September next, except as otherwise prescribed in this act.

§ 5. Chapter four hundred and forty-nine of the laws of eighteen hundred and seventy-six is hereby amended as follows:

1. In section five the words "the first day of May, eighteen hundred and seventy-seven," are stricken out whenever they occur, and the words "the first day of September, eighteen hundred and seventy-seven," are inserted in place thereof, except that the words "the first day of May, eighteen hundred and seventy-seven," are retained in subdivision seven of that section, so far as they apply to title third or title fourth, or article first of title fifth of chapter ten of the said chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six.

2. In section fifteen of the said act the words "the thirtieth day of April, eighteen hundred and seventy-seven," are stricken out and the words "the thirty-first day of August, eighteen hundred and seventy-seven," are substituted in place thereof, except so far as they apply to title third or title fourth, or article first of title fifth of chapter ten of the said chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six.

§ 6. The provisions of law which were in force on the thirtieth day of April, eighteen hundred and seventy-seven, and which were superseded in whole or in part by the provisions of said chapters four hundred and forty-eight and four hundred and forty-nine of the laws of eighteen hundred and seventy-six, except the provisions superseded by sections three hundred and three to three hundred and six thereof, both inclusive, and sections one thousand and twenty-seven to one thousand one hundred and eighty thereof, both inclusive, shall be operative and continue in full force and effect until the first day of September, eighteen hundred and seventy-seven.

§ 7. This act shall take effect immediately.

STATE OF NEW YORK, }
Office of the Secretary of State. } *ss.:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

JOHN BIGELOW,
Secretary of State.

AMENDING ACT.

CHAP. 416, LAWS OF 1877.

AN ACT to amend chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, entitled "An act relating to courts, officers of justice, and civil proceedings," and to provide for the publication of the act, as amended.

Passed May 1877.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. (The amendments adopted in this section appear in their proper places in the code.)

§ 2. The commissioners to revise the statutes are hereby authorized and required, within sixty days after the final adjournment of this session of the legislature, to correct the text of the act entitled "An act relating to courts, officers of justice, and civil proceedings," passed June two, eighteen hundred and seventy-six, by incorporating therein the amendments made by this act, so that the text will read as it is intended by this act that it shall read, and by appending thereto any matters added thereto. by any act or acts supplemental to chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, passed at this session of the legislature. The commissioners must make the amendments and corrections specified in this act by causing the act, thus corrected and amended, to be written or printed in a book, and depositing the book in the office of the secretary of state, with a certificate thereupon, signed by the commissioners, or a majority of them, to the effect that it contains the correct text of the code of civil procedure, as amended and completed by the acts of the legislature, passed since its enactment. The book so deposited shall be presumptive evidence of the matter so certified. A copy thereof may be read in evidence, if it contains a written or printed certificate of the secretary of state, or of the commissioners to revise the statutes or a majority of them, to the effect that it is a correct transcript of the code of civil procedure, as amended and completed by the acts of the legislature, passed since its enactment.

§ 3. This act and any act or acts, passed at this session of the legislature, supplemental to chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, shall not be printed or published for the use of the state, or of any state department or state

officer, or otherwise in any manner at the expense of the state, except in the volumes containing the laws of this session, to be printed and published as prescribed by law; nor shall they be printed or published in any newspaper at the expense of the state or of any county. Any act or acts, passed at this session of the legislature, supplemental to chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, and also the standard text of the code of civil procedure, prepared by the commissioners to revise the statutes, and deposited in the office of the Secretary of State, as provided for by the last preceding section of this act, with the certificate of the said commissioners thereupon, shall be printed in a separate volume of the session laws, which shall contain no other law passed at this session, and the said standard text of the code of civil procedure shall be separately indexed at the end of the said volume, but the other act or acts in the said volume shall not be indexed.

§ 4. This act shall take effect on the first day of September, 1877.

PORTIONS

OF THE

CODE OF PROCEDURE,

NOT EXPRESSLY REPEALED IN 1877.*

[*As amended to July* 1, 1877.]

[PASSED APRIL 12, 1848.]

General definitions and divisions.

SECTION 1. Remedies in the courts of justice are divided into, Remedies.
1. Actions.
2. Special proceedings.

§ 2. An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions.

§ 3. Every other remedy is a special proceeding. Special proceedings.

§ 4. Actions are of two kinds: Division of actions.
1. Civil.
2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offense, for the punishment thereof. Criminal action.

§ 6. Every other is a civil action. Civil action.

§ 7. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. Remedies not merged.

§ 8. This act is divided into two parts: Division of act.
The first relates to the courts of justice and their jurisdiction.
The second relates to civil actions commenced in the courts of this State after the first day of July, 1848, except when otherwise provided therein, and is distributed into fifteen titles. The first four relate to actions in all the courts of the State, and the others to actions in the supreme court, in the county courts, in the superior court of the city of New York, in the court of common pleas for the city and county of New York, in the mayors' courts of cities, and in the recorders' courts of cities, and to appeals to the court of appeals, to the supreme court, to the county courts, and to the superior court of the city of New York.

* See L. 1877, ch. 417, enacted to take effect Sept. 1, 1877.

PART I.

OF THE COURTS OF JUSTICE AND THEIR JURISDICTION.

TITLE IV.

Of the county courts.

Jurisdiction.

§ 30. The county court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

2. The exclusive power to review, in the first instance, a judgment rendered in a civil action by a justices' court in the county, or by a justices' court in cities, and to affirm, reverse or modify such judgment.

10. To exercise the power and authority heretofore vested in such courts of common pleas over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.

11. To exercise all the powers and jurisdiction conferred by statute upon the late courts of common pleas of the county, or the judges or any judge thereof, respecting ferries, fisheries, turnpike roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed or non-resident debtors, gaol liberties, the removal of occupants from State lands, the laying out of railroads through Indian lands, and upon appeal from the determination of commissioners of highways, and all other powers and jurisdiction conferred by statute, which has not been repealed, on the late court of common pleas of the county, or on the county court, since the late courts of common pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction when the provisions of any statute are inconsistent with the organization of the county court.

TITLE VI.

Of the courts of justices of the peace.

Repeal of existing provisions.

§ 52. The provisions contained in sections two, three and four of the article of the Revised Statutes, entitled "Of the jurisdiction of justices' courts," as amended by sections one and two of the act concerning

tices' courts, passed May 14, 1840, and the provisions contained in tions fifty-nine to sixty-six of the same article, both inclusive, are ealed, and the provisions of this title substituted in place thereof. t this repeal shall not affect any action heretofore commenced in a rt of a justice of the peace.

§ 53. Justices of the peace shall have civil jurisdiction in the follow- Jurisdiction. actions, and no others, excepting as in the second section [L. 1861, 158] it is provided:

1. In actions arising on contracts for the recovery of money only, if sum claimed does not exceed two hundred dollars.

2. An action for damages for injury to rights pertaining to the per-, or to personal or real property, if the damages claimed do not eed two hundred dollars.

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property, as now pro-led by statute, if the debt or damages claimed do not exceed two ndred dollars.

5. An action upon a bond conditioned for the payment of money, t exceeding two hundred dollars, though the penalty exceed that n, the judgment to be given for the sum actually due. Where the yments are to be made by installments, an action may be brought each installment as it becomes due.

6. An action upon a surety bond taken by them, though the penalty amount claimed exceed two hundred dollars.

7. An action upon a judgment rendered in a court of justice of the ace, or by a justice, or other inferior court in a city, where such tion is not prohibited by section 71.

8. To take and enter judgment on the confession of a defendant, ere the amount confessed shall not exceed five hundred dollars, in e manner prescribed by article 8, title 4, chapter 2, of part 3 of the vised Statutes.

9. An action for damages for fraud in the sale, purchase or exchange personal property, if the damages claimed do not exceed two hun-ed dollars.

10. An action to recover the possession of personal property claimed, e value of which, as stated in the affidavit of the plaintiff, his agent attorney, shall not exceed the sum of two hundred dollars.

* The plaintiff, in such action, at the time of issuing the summons, t not afterward, may claim the immediate delivery of such property hereinafter provided.

Before any process shall be issued in an action to recover the posses-on of personal property, the plaintiff, his agent or attorney, shall ake proof by affidavit, showing:

(1) That the plaintiff is the owner, or entitled to immediate posses-on, of the property claimed, particularly describing the same.

(2) That such property is wrongfully withheld or detained by the efendant.

(3) The cause of such detention, or withholding thereof, according the best knowledge, information and belief of the person making e affidavit.

(4) That said personal property has not been taken for any tax, fine assessment, pursuant to statute, or seized by virtue of an execution

This and the following paragraphs to section 54, consist of L. 1860, ch. 131, §§ 2-13, as ended. They are not a part of the Code of Procedure, but are inserted here, as has been tomary, for the sake of convenience.

or attachment against the property of said plaintiff; or, if so seized, that it is exempt from such seizure by statute.

(5) The actual value of said personal property.

On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the justice of the peace before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit, for the prosecution of said action, and for the return of said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against said plaintiff, the justice shall indorse upon said affidavit a direction to any constable of the county in which said justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said justice shall, at the same time, issue a summons directed to the defendant, and requiring him to appear before said justice, at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that, in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

The constable to whom said affidavit, indorsement and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the said summons.

The defendant may, at any time after such service, and at least two days before the return day of said summons, serve upon plaintiff, or upon the constable who made such service, a notice, in writing, that he excepts to the sureties in said bond or undertaking, and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties on the return day of said summons, who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

At any time before the return day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

The qualification of sureties, and their justification under this act, shall be the same as provided in sections 194 and 195 of the Code, in respect to bail on arrest in the supreme court.

Sections 214, 215 and 216 of the Code shall apply to proceedings and actions brought under this act, substituting the word constable for the word sheriff, whenever it occurs in either of said sections.

The actions so commenced shall be tried in all respects as other actions are tried in justices' courts. The judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon, and if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable, within sixty days after its receipt by the officer, to the justice who issued the same.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant, by answer, shall claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a constable that he had taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

For the indorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

No jurisdiction.

§ 54. But no justice of the peace shall have cognizance of a civil action.

1. In which the people of this State are a party, excepting for penalties not exceeding one hundred dollars.

2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive.

3. Nor if a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction.

4. Nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars.

5. Nor of an action against an executor or administrator as such.

Answer of title.

§ 55. In every action brought in a court of justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defense, set forth in his answer any matter showing that such title will come in question.

Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same and deliver it to the plaintiff.

Undertaking to be given.

§ 56. At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that, if the plaintiff shall, within twenty days thereafter, deposit with the justice a summons and complaint in an action in the supreme court for the same cause, the defendant will, within twenty days after such deposit, give an admission, in writing, of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide that he will, at all times, render himself amenable to the process of the court during the pendancy of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

Action discontinued; costs.

§ 57. Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice, may be recovered of the plaintiff.

If undertaking not given.

§ 58. If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defense, from drawing the title in question.

The same.

§ 59. If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

Another action may be brought.

§ 60. When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56 and 57, the plaintiff may prosecute an action for the same cause in the supreme court, and shall complain for the same cause of action only, on which he relied before the justice; and the answer of the defendant shall set up the same defense only, which he made before the justice.

Costs.

§ 61. If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

Answer of title as to part. Transfer of cases to supreme court.

§ 62. If, in an action before a justice, the plaintiff have several causes of action, to one of which the defense of title to real property shall be interposed, and as to such cause the defendant shall answer and deliver an undertaking, as provided in sections 55 and 56, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the supreme court. As to the other causes of action, the justice may continue his proceedings.

All actions pending in any county court on the 7th day of May, 1858, in all cases in which a plea of title was interposed in actions originally commenced in a justice's court, are transferred to and vested in the supreme court, with full power and jurisdiction to proceed

erein as commenced in said supreme court, by reason of a plea of le having been interposed in a justice's court in like cases.

§ 63. A justice of the peace, on the demand of a party in whose vor he shall have rendered a judgment, shall give a transcript ereof, which may be filed and docketed in the office of the clerk of e county where the judgment was rendered. The time of the receipt the transcript by the clerk shall be noted thereon and entered in the ocket; and from that time the judgment shall be a judgment of the unty court. A certified transcript of such judgment may be filed and ocketed in the clerk's office of any other county, and with the like fect, in every respect, as in the county where the judgment was ndered, except that it shall be a lien only from the time of filing and ocketing the transcript. But no such judgment for a less sum than wenty-five dollars, exclusive of costs, hereafter docketed shall be a ien upon, or enforced against, real property. Docketing justice's judgment.

§ 64. The following rules shall be observed in the courts of justices f the peace: Rules.

1. The pleadings in these courts are:
   1. The complaint by the plaintiff.
   2. The answer by the defendant.
2. The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him and a reference to them shall be made in the docket.
3. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.
4. The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defense or counterclaim.
5. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.
6. Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable him to understand it, or it contains no cause of action or defense, although it be taken as true.
7. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.
8. In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case.
9. In an action or defense, founded upon an account or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon from the adverse party a specified sum, which he claims to recover or set off.
10. A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.
11. The pleadings may be amended at any time before the trial or during the trial, or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse

party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

12. Execution may be issued on a judgment heretofore or hereafter rendered in a justice's court, at any time within five years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13. If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the county court, except as provided in section 63.

14. The court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power, and, in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15. The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts.

The defendant may, on the return of process, and before answering, make an offer, in writing, to allow judgment to be taken against him for an amount to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof, in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

TITLE VII.

Of justices' and other inferior courts in cities.

CHAPTER I.

THE MARINE COURTS OF THE CITY OF NEW YORK.

§ 65. [Obsolete.]

CHAPTER II.

THE JUSTICES' COURT IN THE CITY OF NEW YORK.

Landlord proceedings; stenographer; trial fee.

§ 66. The district courts of the city of New York shall have such jurisdiction as is provided by special statutes; and proceedings under article 2 of title 10 of chapter 8 of part 3 of the Revised Statutes may be had before any justice of such courts, without regard to the district in which the premises are situated; and the affidavits used in such proceedings may be taken before any officer authorized by law to take affi-

davits. And the justices of the district courts of the city of New York are hereby respectively authorized to appoint a stenographer in their several courts, whose duty it shall be to take full stenographic notes of all proceedings in trials had therein; he shall hold his office during the pleasure of the justice of the court, and shall receive a salary of $2,000 per annum out of the city treasury. The clerks of the said district courts shall collect, in all cases in which a trial is had, the sum of $1, in addition to the other fees authorized by law, and shall pay the same into the city treasury in like manner with other fees collected by them.

CHAPTER III.

THE JUSTICES' COURTS OF CITIES.

Jurisdiction.

§ 67. The justices' courts of cities shall have jurisdiction in the following cases, and no other:

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed $100.

CHAPTER IV.

GENERAL PROVISIONS.

Sections 55 and 64 applied.

§ 68. The provisions of sections 55 to 64, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to their effect, and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title; except that, after the discontinuance of the actions in the inferior court upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof, and except also that in the city and county of New York a judgment for $25 or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as and be deemed a judgment of the court of common pleas for the city and county of New York.

PART II.

OF CIVIL ACTIONS.

TITLE I.

Of the form of civil actions.

Distinction between actions and suits abolished.

§ 69. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

Parties, how designated.

§ 70. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Actions on judgments.

§ 71. No action shall be brought upon a judgment rendered in any court of this State, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

TITLE III.

Of the parties to civil actions.

Action by party in interest; grantee of land held adversely.

§ 111. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land, in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that o the grantor at the time of the delivery of the grant, and the plaintil

shall be allowed to prove the facts to bring the case within this provision.

Assignment of things in action.

§ 112. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration before due.

Who to be defendant.

§ 118. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and, in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such action.

TITLE V.

Of the manner of commencing civil actions.

Notice of lis pendens; action when deemed pending; canceled notice.

§ 132. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment, under chapter four of title seven, part second of this Code, shall be issued, or at any time afterwards, the plaintiff or a defendant, when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer, or at any time afterward, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action. For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice; provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing. And the court, in which said action was commenced, may, in its discretion, at any time after the action shall be settled, discontinued or abated, as is provided in section number 121, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be canceled of record by the clerk of any county in

TITLE 5.

whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which the clerk shall be entitled to a fee of twenty-five cents.

Joint and several debtors; partners.

§ 136. Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants, jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise directs; and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may, by action, recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

TITLE VI.

Of the pleadings in civil actions.

CHAPTER V.

GENERAL RULES OF PLEADING.

Actions to recover property distrained for damages.

§ 166. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

What causes of action may be joined; foreclosure.

§ 167. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

TITLE VII.

Of the provisional remedies in civil actions.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

Delivery of personal property.

§ 206. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

Affidavit and its requisites.

§ 207. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property.

Requisition to sheriff to take and deliver the property.

§ 208. The plaintiff may thereupon, by an indorsement, in writing, upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

Security by plaintiff.

§ 209. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound, in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Exception to sureties.

§ 210. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be

substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Defendant, when entitled to redelivery.

§ 211. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

Justification of defendant's sureties.

§ 212. The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time, but if they, or others in their place, fail to justify, at the time and place appointed, he shall deliver the property to the plaintiff.

Qualifications and justification of sureties.

§ 213. The qualifications of sureties and their justification shall be as are prescribed by sections 194 and 195, in respect to bail upon an order of arrest.

Property how taken when concealed in building or inclosure.

§ 214. If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary he may call to his aid the power of his county.

Property, how kept.

§ 215. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Claim of property by third person.

§ 216. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff; the sheriff shall not be bound to keep the property, or deliver it to the plaintiff unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property, by any other person than the defendant or his agent, shall be valid against the sheriff unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Filing notice and affidavit.

§ 217. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking of the property mentioned therein.

CHAPTER III.

INJUNCTION.

§ 224. An injunction to suspend the general and ordinary business of a corporation shall not be granted, except by the court or a judge thereof. Nor shall it be granted, without due notice of the application therefor, to the proper officers of the corporation, except where the people of the State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, 1850, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct. Security upon injunction to suspend business of corporation.

CHAPTER IV.

ATTACHMENT.

§ 243. The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements under the provisions of chapter five, title one and part two of the Revised Statutes. Provided, however, that no poundage or other compensation shall be allowed to the said sheriff (except his fee of fifty cents for making the levy, and such compensation for his trouble and expense in taking possession of and preserving the property as shall be fixed by the officer issuing the attachment), unless a settlement shall be had or a judgment shall be recovered and collected, in whole or in part, in the action in which the attachment in this title referred to shall have issued. And where a judgment shall have been recovered and collected in part only, the amount of his poundage shall not be estimated upon any sum greater than the sum collected upon such judgment. And where a settlement shall be had, the amount of his poundage shall not be estimated upon any sum greater than the amount at which said settlement is made. Sheriff's fees.

CHAPTER V.

PROVISIONAL REMEDIES.

§ 244. A receiver may be appointed:

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment. Receivers.

4. In the cases, provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases of the property within this State of foreign corporations. Receivers of the property within this State of foreign or other corporations shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them.

TITLE VIII.

Of the trial and judgment in civil actions.

CHAPTER II.

ISSUES AND THE MODE OF TRIAL.

Notice of trial; note of issue; stenographer.

§ 256. **At any time after issue, and at least fourteen days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least twelve days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue, and shall prepare and have ready for distribution copies of said calendar five days before the court. In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice.* In every action in which issue of fact is now joined, and the action is now placed upon the calendar of the supreme court of the first judicial district, or of the superior court of the city of New York, or of the court of common pleas for the city and county of New York, the party who shall have filed such note of issue shall, as a condition precedent to such action being brought to trial, pay to the clerk of the court the sum of three dollars; and in every action in either of the said courts, commenced after the passage of this act, the party who shall file therein a first note of issue of fact shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars; and the amounts so received shall be accounted for under oath, and paid over monthly by the clerk of each of said courts, to the comptroller of the city of New York, and by him deposited in the county treasury, to be used for a fund for the payment of the salaries of stenographers employed in said courts, as provided for in this section; but this shall not apply to cases where the fee of three dollars has once been paid. If the fund thus created be inadequate to pay such salaries, the additional amount necessary for such payment shall be appropriated and paid from the funds of county contingencies, to which fund any surplus of the sums so paid over to the comptroller, as hereinbefore provided, shall be credited.

Each of the courts hereinbefore named shall appoint a stenographer for the circuit, trial term or special term at which issues of fact are tried, which constitutes a separate branch of such court, who shall *be a sworn officer of the court, shall hold office during the pleasure of the court, and shall* be paid a salary of twenty-five hundred dollars per annum, in like manner as the salaries of other officers of the courts are now paid. *It shall be the duty of every stenographer so appointed, for any circuit, trial term or special term, under the direction of the presiding judge thereof, to take full stenographic notes of all proceedings in every trial thereat; and in case the presiding judge shall require a transcript of said stenographic notes, he may order the expense thereof to be paid equally by*

*The portions of this section printed in italics deemed abrogated by L. 1877, ch. 417. See id., § 1, subd. 4, paragraph 15.

the parties to the action, at the rate of ten cents for every one hundred words so transcribed, and may enforce payment thereof, and the amount so paid, together with the sum paid as a condition precedent to the cause being brought to trial, or to the first note of issue being filed, as hereinbefore provided, shall be deemed a necessary disbursement within the meaning of section 311 of the Code of Procedure, and shall be allowed as such to the prevailing party in the action.

At any extra circuit, trial term or special term of said courts, the presiding judge thereof shall appoint a stenographer for such extra circuit or term, who shall, in like manner as aforesaid, be a sworn officer, and who shall be paid a compensation at the rate and in the manner hereinbefore provided. When a court of oyer and terminer shall be held in and for the city and county of New York, the presiding judge thereof shall designate one of the stenographers of the supreme court to act as stenographer of such court of oyer and terminer during its session, who shall, in like manner as aforesaid, be a sworn officer, but who shall receive no compensation in addition to his salary as hereinbefore provided, except that in case a transcript of his stenographic notes, taken on the trial of any criminal cause, be required for the use of the presiding judge, or of the district-attorney, the expense thereof shall, on the order of such judge or district-attorney, be paid as a county charge, at the rate hereinbefore specified.

The surrogate of the county of New York is hereby authorized and directed to appoint a stenographer to the surrogate's court of said county, who shall be a sworn officer of the court, and shall be paid a salary of three thousand dollars a year, in like manner as the salaries of clerks in said court are now paid by law from the fees of said court, paid into the treasury of the county of New York. The stenographer so appointed shall be skilled in the practice of his art, and shall hold his position during good behavior, and so long as he efficiently discharges the duties of his office. He shall, under the direction of the said surrogate, take full stenographic notes of all proceedings in said court, in which oral proofs shall be given, which notes shall be fairly transcribed, and after being signed by the witnesses, deponent or affiant, shall be filed in the office of said surrogate. By consent of the parties to the proceeding in which such proofs shall be taken, and said surrogate, the signing of such record of proof by the witness, deponent or affiant may be waived, in which case such record, after being authenticated by the certificate of said stenographer, or said surrogate, shall be deemed to be the record of any proofs or proceedings so taken.

In other counties of this State, on trials of issues of fact, at any circuit court or court of oyer and terminer, it shall be lawful for the presiding justice, in his discretion, to employ a stenographer, who shall be entitled to such compensation as shall be certified by such justice, not exceeding five dollars for each day's attendance at such court, at the request of such justice, and ten cents a mile for travel from his place of residence to the place where the court is held, together with such sum for stationery as the presiding justice shall certify, which compensation shall be a charge upon the counties in which such courts shall be held respectively, and shall be allowed and paid from the court fund, in like manner as other charges are allowed and paid from it. It shall be the duty of such stenographer to furnish to any party to such trials, upon request, a copy of the evidence and proceedings taken by him on such trials, or of such part thereof as may be required, on payment, on behalf of such party, of ten cents for every one hundred words of the copy so furnished. In the surrogates' courts of the counties of New York and Kings, and of other counties in which a stenographer is or

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shall be duly authorized to take stenographic notes of proceedi said courts, in which oral proofs shall be given in case of the de any witness, deponent, or affiant, after examination, and bef stenographer's notes of such examination shall have been trans such notes after being fairly transcribed and authenticated by t tificate of the surrogate, shall be filed in his office and be deeme the record of the proofs so taken, without any signing thereof b witnesses.

CHAPTER V.

TRIAL BY JURY.

What verdict jury may render.

§ 261. In an action for the recovery of specific personal prop the property have not been delivered to the plaintiff, or the def by his answer claim a return thereof, the jury shall assess the v the property, if their verdict be in favor of the plaintiff; or if th in favor of the defendant, and that he is entitled to a return th and may at the same time assess the damages, if any are clai the complaint or answer, which the prevailing party has sustai reason of the detention or taking and withholding such property

CHAPTER VI.

MANNER OF ENTERING JUDGMENT.

Judgment in action for recovery of personal property.

§ 277. In an action to recover the possession of personal pr judgment for the plaintiff may be for the possession, or for the re of possession, or the value thereof, in case a delivery cannot l and of damages for the detention. If the property have been de to the plaintiff, and the defendant claim a return thereof, juc for the defendant may be for a return of the property, or the thereof, in case a return cannot be had, and damages for taki withholding the same.

TITLE IX.

Of the execution of the judgment in civil actions.

CHAPTER I.

THE EXECUTION.

Executions on justice's judgments.

§ 284. When judgment shall have been rendered in a court of of the peace, or in a justice's or other inferior court in a city, an eted in the office of the clerk of the county, the application fo to issue execution must be to the county court of the county wh judgment was rendered, or, in the city and county of New York court of common pleas of that city and county.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

Order for discovery of property; examination of judgment debtor.

§ 292. When an execution against property of the judgment debtor, or any one of several debtors in the same judgment issued to the sheriff of the county where he resides or has a place of business, or if he do not reside in the State, to the sheriff of the county where a judgment-roll, or a transcript of a justice's judgment for twenty-five dollars or upward, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued. But in case of an order made by a justice of the supreme court, all subsequent proceedings shall be had before some justice in the judicial district where the judgment debtor resides, to be specified in the order. After the issuing of an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the court of common pleas for the city and county of New York, that any judgment debtor, residing in the county where such judge or officer resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place to answer concerning the same; and such proceedings may thereupon be had for the application of the property for the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution. Whenever it shall satisfactorily appear, by affidavit, to a justice of the supreme court that such county judge, or judge of said court of common pleas, is incapacitated from acting in any of the proceedings whatever, herein authorized, from any cause or causes whatsoever, such justice of the supreme court shall have the same powers and authority, in all cases whatever, as are herein conferred upon him, as to cases of judgments in the supreme court. On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof, by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and, if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to

prison, by warrant of the judge, as for a contempt. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Any debtor may pay execution against his creditor.

§ 293. After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Examination of debtors of judgment debtor or of those having property belonging to him; joint debtors.

§ 294. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

The proceedings mentioned in this section, and in section 292, may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors, to obtain satisfaction of judgments out of the property of joint debtors, are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

Witnesses required to testify.

§ 295. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

Compelling attendance.

§ 296. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee under this chapter shall be on oath, except that when a corporation answers the answer shall be on the oath of an officer thereof.

Property ordered to be applied to execution.

§ 297. The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

Judge may appoint receiver, and prohibit transfer,

§ 298. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court according to section 244. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party, or otherwise,

whether any other supplementary proceedings are pending against the judgment debtor, and, if such proceedings are so pending, the plaintiff herein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, and any interference therewith.

etc., of property; order appointing receiver to be filed; receiver subject to control of court.

Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded; or, if the judgment is upon a transcript from justice's court filed in county clerk's office, then he shall be subject to the direction and control of the county court.

But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

Proceedings upon claim of another party to property, or denial of indebtedness to judgment debtor.

§ 299. If it appear that a person or corporation, alleged to have property of the judgment debtor or indebted to him, claims an interest in the property, adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

Reference by judge.

§ 300. The judge may, in his discretion, order a reference to a referee agreed upon by the parties or appointed by him to report the evidence or the facts, and may in his discretion appoint such referee in the first order or at any time.

Costs of proceeding.

§ 301. The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

Disobedience of order; how punished.

§ 302. If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this chapter, or the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

The same costs shall be allowed to the plaintiff in proceedings under chapter two, title twelve of the second part of this Code (sections 375 to 381), as upon the commencement of an action.

Additional allowance.

§ 308. In addition to these allowances there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action for the partition of real property, or for the foreclosure of a mortgage, or in any action in which a warrant of attachment has been issued, or for an adjudication upon a will or other instrument, in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent on the recovery, as in the next section prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent for any additional amount not exceeding four hundred dollars; and an additional sum of two per cent for any additional amount not exceeding one thousand dollars.

And in the actions aboved named, if the same shall be settled before judgment therein, like allowances upon the amount paid or secured upon such settlement, at one-half the rates above specified.

Percentage, how computed.

§ 309. These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or instrument, or sought to be partitioned, or the amount found due or unpaid upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the court for an order enforcing the payment of any installment falling due, after judgment, in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the court or by the commissioners, in case of actual partition. In difficult and extraordinary cases, where a defense has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent upon the amount of recovery, or claim or subject-matter involved. And in an action for the foreclosure of a mortgage, the court may make a like allowance, not exceeding two and a half per centum, nor the aggregate sum of two hundred dollars, nor shall a greater sum than fifty dollars be charged by or allowed to any sheriff, referee or other officer for his fees, percentage or services for any sale under a decree or judgment of foreclosure. But in no action whatever shall an allowance of more than two thousand dollars be made to any party, or to all the parties, if more than one on either side.

Costs how to be inserted in judgment.

§ 311. The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail, and verified by affidavit. A copy of the items of the costs and disbursements shall be served with the notice of adjustment.

Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the

2. When a judgment shall be affirmed in part and reversed in part.

§ 307. When allowed, costs shall be as follows:

Amount of costs allowed.

1. To the plaintiff, for all proceedings before notice of trial in actions where judgment for failure to answer can be taken without application to the court, fifteen dollars; where judgment can only be taken on such application, twenty-five dollars; for all proceedings after notice of and before trial, fifteen dollars; for each additional defendant served with process, not exceeding ten, two dollars, and for each necessary defendant in excess of that number, served with process, one dollar.

2. To the defendant, for all proceedings before notice of trial, ten dollars; and for all proceedings after notice of and before trial, fifteen dollars.

3. To either party, where a new trial shall be had, for all proceedings after the granting of and before such new trial, twenty-five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, ten dollars; for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars; for attending the examination of a party before trial, ten dollars; for making and serving a case, or case containing exceptions, twenty dollars, except that where the case shall necessarily contain more than fifty folios, there shall be allowed ten dollars in addition thereto; and for making and serving amendments thereto, ten dollars. To the plaintiff, for the appointment of a guardian of an infant defendant, ten dollars; but no more than ten dollars shall be allowed for the appointment of guardians in any one action. To the plaintiff for procuring an order of injunction, ten dollars.

4. To either party for the trial or an issue of law, twenty dollars; for every trial of an issue of fact, thirty dollars; and where the trial shall necessarily occupy more than two days, ten dollars in addition thereto.

5. To either party on appeal, except to the court of appeals, and except appeals in the cases mentioned in subdivisions 1, 3, 4 and 5 of section 349, and except in cases mentioned in the second paragraph of section 344, before argument, twenty dollars; for argument, forty dollars: and the same costs shall be allowed to either party before argument and for argument on application for judgment, upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial on a case made, and in cases where exceptions are ordered to be heard, in the first instance, at a general term, under the provisions of section 265.

6. To either party on appeal to the court of appeals, before argument, thirty dollars; for argument, sixty dollars: and when a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent on the amount of the judgment: for preparing and serving a case, or case containing exceptions, in appeals to the court of appeals, twenty dollars.

7. To either party, for every circuit or term, not exceeding five circuits and five special and five general terms, at which the cause is necessarily on the calendar and is not tried, or is postponed by order of the court, ten dollars; and for every term not exceeding ten, excluding the term at which the cause is argued in the court of appeals, ten dollars: but in an action hereafter brought to recover dower, before admeasurement, of real property aliened by the husband, the plaintiff shall not be entitled to costs unless it appear that the dower was demanded before the commencement of the action and was refused.

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not be recovered of the people till after execution issued therefor against such private party, and returned unsatisfied.

Costs in actions by the people.

§ 320. In an action prosecuted in the name of the people of this State for the recovery of money or property, or to establish a right or claim, for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff, shall be a charge against the party for whose benefit the action was prosecuted, and not against the people.

Costs against assignee of cause of action after action brought.

§ 321. In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner become the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party, and payment thereof may be enforced by attachment.

Costs on a settlement.

§ 322. Upon the settlement, before judgment, of any action, mentioned in section 304, no greater sum shall be demanded from the defendant as costs, than at the rates prescribed by that section.

TITLE XI.

Of appeals in civil actions.

CHAPTER V.

APPEAL TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK, OR TO A COUNTY COURT, FROM AN INFERIOR COURT.

Existing laws repealed.

§ 351. All statutes, now in force, providing for the review of judgment in civil cases, rendered by courts of justices of the peace, by the marine court of the city of New York, by the justices' courts in the city of New York, by the municipal court of the city of Brooklyn, and by the justices' courts of cities, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

Review of judgment-new trial.

§ 352. When a judgment shall have been rendered by the general term of the marine court of the city of New York, or by a justice of a justice's court of that city, the appeal shall be to the court of common pleas for the city and county of New York.

The appeal from the general term of the marine court prescribed herein shall be from an actual determination at such general term only, and shall be taken within twenty days after judgment by such general term. In the city of Buffalo, the appeals from the courts of justices of said city shall be to the superior court of said city. When rendered by any of the other courts enumerated in section 351, the appeal shall be to the county court of the county where the judgment was rendered. On such appeal, when the amount of the claim or claims for which judgment was demanded by either party in his pleadings in the court below shall exceed fifty dollars, or when, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, a new trial shall be had in the county court in the following appellate cases:

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not.

And when the appeal is to the superior court of Buffalo, in the cases in which, by the terms of this section, a new trial may be had, such new trial shall be had in the said superior court.

Provided, however, that the appellant may, in cases where the amount for which judgment is demanded by either party in his pleadings exceeds fifty dollars, or where, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, state in the notice of appeal that such appeal is taken upon questions of law only, in which case a new trial shall not be had in the appellate court, but the appeal shall be heard and determined in the same manner as if such amount or said value and damages were fifty dollars or under. Provided, however, that in the city and county of New York appeals from the marine and district courts shall be taken and heard, and returns made in the same manner as heretofore.

Appeal.

§ 353. The appellant shall, within twenty days after judgment, serve a notice of appeal stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

Notice of appeal; costs; security.

§ 354. The notice of appeal must, within the same time, be served on the justice, personally, if living and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence, with some person of suitable age and discretion; or in case the respondent is not a resident of such county, or cannot, after due diligence, be found therein, in the same manner, on the attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court, and the appellant must, at the time of the service of the notice of appeal on the justice, or on his clerk, as herein provided (except in cases of appeals from the district courts in the city of New York, and the general term of the marine court of the city of New York), pay to such justice or clerk the cost of the action, included in the judgment, together with two dollars costs of the return, which shall be included in the judgment for costs on reversal. In all cases of appeal from the general term of the marine court of the city of New York, and from the district courts of the city of New York, to the court of common pleas for the city and county of New York, the appellant shall, at the time of the service of the notice of appeal, pay to the clerk of the marine court, or to the justice or clerk of the district court, two dollars, as costs of the return to such court of common pleas, which costs so paid shall be included in the judgments for costs, in case the judgment of the court below shall be reversed; and the appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements and extra costs, awarded against him in the court below, if such judgment shall be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded

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against him thereon; such sureties to justify in double the amount specified in the undertaking; such undertaking and the sufficiency of the sureties to be approved by the justice of the court below, or one of the judges of the court of common pleas, or the appellant may deposit with the clerk of the court of common pleas the costs, disbursements and extra costs, included in the judgment in the court below, and the sum of fifteen dollars to meet any costs that may be awarded against him in such appeal; and such appeal from the general term of the marine court and the district court shall be ineffectual, unless within the time specified for bringing the appeal the appellant execute such undertaking, or make such deposit; the undertaking, when executed and approved, to be filed with the clerk of the court of common pleas; the amount so deposited shall be repaid by said clerk to the appellant, if he succeed on the appeal; and, in case the judgment be affirmed, the said clerk shall, after execution is issued, pay over the amount so deposited to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent thereof, and the balance, if any, on the execution issued on the judgment appealed from.

Stay of execution.

§ 355. When, by the terms of section 352, the appellant is entitled to a new trial in the appellate court, he shall, at the time of taking his appeal, and in all other cases, if he desires a stay of execution of the judgment, give security as provided in the next section.

Undertaking.

§ 356. The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge, or by the court below, to the effect that, if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

Stay of execution.

§ 357. The delivery of the undertaking to the court below shall stay the issuing of execution; or, if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

Death of justice.

§ 358. Where, by reason of the death of a justice of the peace, or his removal from the county or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent, or his attorney or agent, as provided in section 354; it shall thereupon have the same effect as if delivered to the justice.

Substituted service of notice of appeal.

§ 359. When, by reason of the death of a justice of the peace, or his absence from the county, or any other cause, the notice of appeal cannot be served as provided by section 353, it may be served by leaving the same with the clerk of the county.

Return.

§ 360. The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment, and file the same in the appellate court. The return may be compelled by attachment. But no justice of the peace shall be bound to make a return unless the fees prescribed by the last section of this chapter be paid on the service of the notice of appeal; provided, however, that in cases where the amount for which judgment is demanded by either party in his pleadings in the court below exceeds fifty dollars, or where the value of the property recovered, as appears from the verdict or judgment, shall exceed fifty dollars, the testimony need not be returned; but in such case the court below shall return the process by which the action was commenced, with the proof of service thereof, and

the pleadings or copies thereof, the proceedings and judgment, together with a brief statement of the amount and nature of the claim or claims litigated by the respective parties, and in all cases the notice of appeal shall be annexed to the return; but in cases where the appellant shall, in accordance with the provisions of section 352 of this act, state in the notice of appeal that such appeal is taken upon questions of law only, the court below shall return to the appellate court the testimony, proceedings and judgment.

Justice out of office.

§ 361. When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall, nevertheless, make a return, in the same manner, and with the like effect, as if he was still in office.

Further return.

§ 362. If the return be defective, the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order by attachment; and the court shall always be deemed open for these purposes.

Justice died, insane, or absent.

§ 363. If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the State, the appellate court may examine witnesses, on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the State, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

Noticing appeal for hearing; dismissing appeal; new trial.

§ 364. If a return be made, and the appeal is from a judgment where a new trial may not be had, as provided by this chapter, it may be brought to a hearing at a general term of the appellate court, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continued thereon without further notice until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order for cause shown. If the appeal is from a judgment where a new trial may be had, it may be brought to a hearing or trial at any term of the county court, at which a petit jury shall be summoned to attend, upon the same notice as provided for actions in the supreme court; at least eight days before the court, the party desiring to bring on the appeal shall serve a note of issue on the clerk, and the clerk shall thereupon enter the cause on the calendar according to the date of the return. And the provisions of this chapter, for a new trial, shall apply as well to appeals heretofore taken and now pending as those hereafter to be brought.

Papers on appeal.

§ 365. The appeal shall be heard on the original papers, or certified copies thereof, and no copies thereof need be furnished for the use of the court.

Judgment, how given.

§ 366. Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the justice, and it is shown by the affidavits

served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial before the same or any other justice in the same county at such time and place and on such terms as the court may deem proper. Where a new trial shall be ordered before a justice, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served. If the appeal shall be from a judgment in which a new trial may be had as in this chapter provided, the court shall proceed to the hearing of the cause, if the issue joined before the justice was an issue of law, or to the trial thereof by jury, if such issue was upon a question of fact.

1. If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case; and, if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed on the same terms and in like case as pleadings in actions in the supreme court; and the court may thereupon require the opposite party to answer such amended pleading or join issue thereon, as the case may require, summarily.

2. If upon an appeal in an issue of law the court should adjudge the pleading complained of to be valid, it shall in like manner require the opposite party summarily to answer such pleading or join issue thereon, as the case may require.

3. Upon an issue of fact being so joined, the court shall proceed to hear the same tried by a jury in the same manner as issues joined in the supreme court.

4. Every issue of fact so joined or brought upon an appeal shall be tried in the same manner as in actions commenced in the supreme court.

5. The court shall have the same power over its own determinations and the verdict of the jury, and shall render judgment thereon in the same manner as the supreme court in actions pending therein, and may allow either party to amend his pleadings upon such terms as shall be just in cases where a new trial may be had, as in this chapter provided; and in any such appeal, on which a new trial is to be had, either party may, at any time before trial, serve upon the opposite party an offer, in writing, to allow judgment to be taken against him for the sum or property, or to the effect in such offer specified, and with or without costs, as said offer shall specify. If the party receiving such offer accept the same, and give notice thereof in writing within ten days, he may file the return and offer, with an affidavit or service of notice of acceptance thereof, and the clerk shall thereupon enter judgment according to said offer. And, if the party making such offer shall have given an undertaking upon the appeal, the parties executing such undertaking shall be liable thereon for the payment of the judgment entered by virtue of said offer. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence. And if the party to whom such offer is made fail to obtain a judgment more favorable to him than that specified in said offer, then he shall not recover costs, but must pay the other party's costs from the date of the service of the offer.

6. Either party may move for a new trial in said court on a case or exception, or otherwise, and such motion may be made before or after judgment has been entered, and the provisions of this act in relation

to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the court, making and settling case and exceptions, motions for new trials, and making up the judgment-roll in the supreme court, are hereby made applicable to all appeals brought up for trial, as in this chapter provided.

Judgment-roll.

§ 367. To every judgment upon appeal there shall be annexed the return upon which it was heard, or a certified copy thereof, the notice of appeal, with any offer, verdict, decision of the court, exceptions, case and all orders and papers in any way involving the merits and necessarily affecting the judgment, which shall be filed with the clerk of the court and shall constitute the judgment-roll.

Award of costs.

§ 368. If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

Restitution.

§ 369. If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days, and if the order shall be made before judgment is entered, the amount may be included in the judgment.

Setting off costs and recovery.

§ 370. If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

Costs on appeal.

§ 371. Costs shall be allowed to the prevailing party in judgments rendered on appeal in all cases, with the following exceptions and limitations: In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. If he claims that the amount of judgment is less favorable to him than it should have been, he shall state what should have been its amount. Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same so corrected shall stand as his judgment and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the justice to correspond with the amended judgment; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment. If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment in the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs; provided, however, that the appellant shall not recover costs unless the judgment appealed from shall be reversed on such appeal, or be made more favorable to him, to the amount of at least ten dollars. If the offer be made and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the court below. But the appellant shall not recover costs except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not.

Whenever costs are awarded to the appellant, he shall be allowed to tax as part thereof the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance. The following fees and costs, and no other, except fees of officers, disbursements and witnesses' fees, shall be allowed on appeal, to the party entitled to costs as herein provided, when the new trial is in the county court.

For proceedings before notice of trial, ten dollars; for all subsequent proceedings before trial, seven dollars; for trial of an issue of law, ten dollars; for every trial of an issue of fact, fifteen dollars; for argument of a motion for a new trial on a case or a bill of exceptions, ten dollars; in all cases, to either party, for every term not exceeding five, at which the appeal is necessarily on the calendar and is not tried or is not postponed by the court, seven dollars. In other appeals the costs shall be as follows: To the appellant, on reversal, fifteen dollars; to the respondent, on the affirmance, twelve dollars. If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of cost allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars. If the appeal be dismissed for want of prosecution, as provided by section 364, no costs shall be allowed to either party. In every appeal the justice of the peace before whom the judgment appealed from was rendered shall receive two dollars for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court. If, in the notice of appeal, the appellant shall not state in what particular or particulars he claims the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed.

TITLE XII.

Of the miscellaneous proceedings in civil actions, and general provisions.

CHAPTER II.

PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.

Parties not summoned in action on joint contract may be summoned after judgment.

§ 375. When a judgment shall be recovered against one or more of several persons, jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

If judgment

§ 376. In case of the death of a judgment debtor after judgment, the heirs, devisees or legatees of the judgment debtor, or the tenants

of real property, owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively, and the personal representatives of a deceased judgment debtor may be so summoned, at any time within one year after their appointment. debtor die his representatives may be summoned.

§ 377. The summons provided in the last two sections shall be subscribed by the judgment creditor, his representatives or attorney, shall describe the judgment, and require the person summoned to show cause, within twenty days after the service of the summons, and shall be served in like manner as the original summons. Form of summons.

§ 378. The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied to his knowledge, or information and belief, and shall specify the amount due thereon. Affidavit of amount due.

§ 379. Upon such summons any party summoned may answer, within the time specified therein, denying the judgment or setting up any defense thereto which may have arisen subsequently to such judgment, and, in addition thereto, if the party be proceeded against according to section 375, he may make any defense which he might have made to the action if the summons had been served on him at the time when the same was originally commenced, and such defense had been then interposed to such action. Party summoned may answer.

§ 380. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary. Subsequent proceedings.

§ 381. The answer and reply shall be verified in like cases and manner, and be subject to the same rules as the answer and reply in an action. Answer and reply to be verified.

TITLE XIII.

Actions in particular cases.

CHAPTER I.

ACTIONS AGAINST FOREIGN CORPORATIONS.

§ 427. An action against a corporation, created by or under the laws of any other State, government or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases: When and by whom brought.

1. By a resident of this State, for any cause of action.

2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

CHAPTER II.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO AND OF INFORMATIONS IN THE NATURE OF QUO WARRANTO.

Scire facias and quo warranto abolished.

§ 428. The writ of scire facias, the writ of quo warranto, and proceeding by information in the nature of quo warranto, are abolished, and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this chapter. But any proceeding heretofore commenced or judgment rendered, or right acquired, shall not be affected by such abolition.

Action to vacate a charter.

§ 429. An action may be brought by the attorney-general, in the name of the people of this State, whenever the legislature shall so direct, against a corporation for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge and consent.

Action to annul a corporation.

§ 430. An action may be brought by the attorney-general, in the name of the people of this State, on leave granted by the supreme court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall,

1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or,

2. Violate the provisions of any law, by which such corporation shall have forfeited its charter, by abuse of its powers; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and, upon leave granted, to bring the action in every case of public interest, and also in every other case in which satisfactory security shall be given, to indemnify the people of this State against the costs and expenses to be incurred thereby.

Leave, how obtained.

§ 431. Leave to bring the action may be granted upon the application of the attorney-general; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Action by attorney-general.

§ 432. An action may be brought by the attorney-general in the name of the people of this State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or,

3. When any association, or number of persons, shall act within this State as a corporation, without being duly incorporated.

Action, when and how brought; to vacate letters patent.

§ 433. An action may be brought by the attorney-general, in the name of the people of this State, for the purpose of vacating or annulling letters patent, granted by the people of this State, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or,

2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or,

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have, by any other means, forfeited the interest acquired under the same.

Relator to be joined as plaintiff.

§ 434. When an action shall be brought by the attorney-general by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff, and in every such case the attorney-general may require, as a condition for bringing such action, that satisfactory security shall be given to indemnify the people of this State against the costs and expenses to be incurred thereby; and in every case where such security is given, the measure of the compensation to be paid by such person or persons to the attorney-general, shall be left to the agreement of the parties, express or implied.

Complaint and arrest of defendant in action for usurping office.

§ 435. Whenever such action shall be brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit, that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court, for the arrest of such defendant and holding him to bail, and thereupon he shall be arrested and held to bail, in the manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Judgment in such action.

§ 436. In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

Assumption of office, etc., by relator, when judgment in his favor.

§ 437. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty, immediately thereafter, to demand of the defendant in the action, all the books and papers in his custody or within his power, belonging to the office from which he shall have been excluded.

Proceeding on refusal to deliver books, etc.

§ 438. If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as are prescribed in article 5, title 6, chapter 6, of the first part of the Revised Statutes.

TITLE 13.

Damages, how recovered.

§ 439. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained, by reason of the usurpation by the defendant of the office, from which such defendant has been excluded.

Action against several claiming one office.

§ 440. Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Award of penalty for usurping office.

§ 441. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be judged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the State.

Judgment of forfeiture against a corporation.

§ 442. If it shall be adjudged that a corporation, against which an action shall have been brought, pursuant to this chapter, has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered, that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Costs against corporations or persons claiming to be such; how collected.

§ 443. If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Restraining corporation; receiver.

§ 444. When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as are given in article 3, title 4, chapter 8, of the third part of the Revised Statutes; and it shall be the duty of the attorney-general, immediately after the rendition of such judgment, to institute proceedings for that purpose.

Filing judgment-roll against corporation.

§ 445. Upon the rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, it shall be the duty of the attorney-general to cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of state.

Entry of judgment relating to letters patent.

§ 446. Such secretary shall thereupon, if the record relate to letters patent, make an entry in the records of the commissioners of the land office, of the substance and effect of such judgment, and of the time when the record thereof was docketed, and the real property granted by such letters patent may thereafter be disposed of by such commissioners, in the same manner as if such letters patent had never been issued.

Actions for forfeiture of property to the people.

§ 447. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the people of this State, or to any officer for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer, in the supreme court.

CHAPTER III.

ACTION FOR THE PARTITION OF REAL PROPERTY.

Revised Statutes applicable to actions for partition.

3. The provisions of the Revised Statutes relating to the partilands, tenements and hereditaments, held or possessed by joint , or tenants in common, shall apply to actions for such partition ; under this act, so far as the same can be so applied to the subnd subject-matter of the action, without regard to its form.

CHAPTER IV.

TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND FOR WASTE AND NUISANCE.

Actions to determine claims to real property; how prosecuted.

. Proceedings to compel the determination of claims to real y, pursuant to the provisions of the Revised Statutes, may be ted by action under this act, without regard to the forms of the ings as they are prescribed by those statutes.

Action of waste abolished; waste, how remediable.

. The action of waste is abolished, but any proceeding hereto- mmenced, or judgment rendered, or right acquired, shall not be thereby. Wrongs heretofore remediable by action of waste, jects of action as other wrongs, in which action there may be nt for damages, forfeiture of the estate of the party offending, ction from the premises.

Revised Statutes applicable to action for waste.

. The provisions of the Revised Statutes relating to the action e, shall apply to an action for waste brought under this act, regard to the form of the action, so far as the same can be so

When judgment of forfeiture and eviction to be given.

. Judgment of forfeiture and eviction shall only be given in the person entitled to the reversion, against the tenant in pos- when the injury to the estate in reversion shall be adjudged action to be equal to the value of the tenant's estate, or unexrm, or to have been done in malice.

Writ of nuisance abolished.

. The writ of nuisance is abolished; but any proceeding here- mmenced, or any judgment rendered or right acquired, shall ffected thereby.

Remedy for injuries heretofore remedied by writ of nuisance.

. Injuries heretofore remediable by writ of nuisance are subaction, as other injuries, and in such action there may be judgr damages, or for the removal of the nuisance, or both.

CHAPTER V.

L PROVISIONS RELATING TO ACTIONS CONCERNING REAL PROPERTY.

Provisions of Revised Statutes applicable thereto.

. The general provisions of the Revised Statutes relating to concerning real property shall apply to actions brought under , according to the subject-matter of the action, and without to its form.

TITLE XIV.

Provisions relating to existing suits.

Appeals from order at special term, on summary application after judgment.

§ 456. The appeal, mentioned in section 9 of the act to facilit determination of existing suits in the courts of this State, may taken from an order, made at a special term, on a summary a tion in an action after judgment, when such order involves the of the application, or some part thereof.

Writ of error abolished.

§ 457. No writ of error shall be hereafter issued, in any case ever. Wherever a right now exists to have a review of a jud rendered, or order or decree made before the first day of July such review can only be had upon an appeal taken in the mann vided by this act, and all appeals heretofore taken from such ments, orders or decrees under the provisions of the Code of Pro which are still pending in an appellate court, and not dismisse be valid and effectual. But this section shall not extend the r review to any case or question to which it does not now extend, time for appealing, nor shall it apply to a case where a writ has been already issued.

Execution on judgment docketed before July, 1848.

§ 458. An execution may be issued without leave of the cou a judgment docketed before the first day of July, 1848, or now after to be rendered in an action pending on that day, at an within five years after the rendering of the judgment.

Application of this act to actions pending.

§ 459. The provisions of this act apply to future proceedi actions or suits heretofore commenced and now pending as follo

1. If there have been no pleading therein, to the pleadings subsequent proceedings.

2. When there is an issue of law or of fact, or any other que fact to be tried, to the trial and all subsequent proceedings.

3. After a judgment or order, to the proceedings to enforce, modify or reverse it, including the costs of an appeal. Whene judges of the supreme court in any district find that the court, term or circuit, has not been, or will not be, able to dispose of cases upon the calendar, they may request the governor to assig judges, and, if necessary, appoint extraordinary terms and circ the purpose of disposing of such cases. The governor may the make such assignment, and the judges assigned must hold th accordingly.

Appeals from certain final decrees.

§ 460. An appeal may be taken from any final decree entere the direction of a single judge, in any suit in equity pending supreme court, on the first day of July, 1847, at any time bef first day of November, 1852. But this provision shall not a cases where a rehearing has a ready been had or ordered, o case of a decree entered before the passage of this act, and to which no attempt in good faith has been, or shall have bee within thirty days after notice of the entry of such decree appeal shall be taken in the manner provided in sections 327 a In all cases of appeal to the court of appeals, in actions whi originally commenced in the late court of chancery of this St court of appeals shall review the cause upon the facts and without any statement or specification of facts found, or any e taken, at the trial of any or either of them. And it shall be

hereby declared to be, the duty of the court of appeals, in any and all such cases, to review the whole matter upon the evidence as well as the law.

§ 461. An issue of fact joined in a county court, or court of common pleas, before the first day of July, 1848, or then pending in that court on appeal, shall be tried by a jury, unless the parties otherwise agree. Issue of fact in county court, how tried.

TITLE XV.

General provisions.

§ 462. The words "real property," as used in this act, are co-extensive with lands, tenements and hereditaments. Definition of "real property."

§ 463. The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt. Definition "personal property."

§ 464. The word "property," as used in this act, includes property, real and personal. Definition of "property."

§ 465. The word "district," as used in this act, signifies judicial district, except when otherwise specified. Definition of "district."

§ 466. The word "clerk," as used in this act, signifies the clerk of the court where the action is pending, and in the supreme court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified. Definition of "clerk"

§ 467. The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act. Rule of construction.

§ 468. All statutory provisions inconsistent with this act are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice. Statutory provisions, inconsistent with this act, repealed.

§ 469. The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated; but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify or alter the same. Rules and practice, inconsistent with this act, abrogated.

§ 471. Until the legislature shall otherwise provide, the second part of this act shall not affect proceedings upon mandamus or prohibition; nor appeals from surrogates' courts, except that the costs on such appeal shall be regulated and allowed in the manner provided in section 318 of this act; nor any special statutory remedy not heretofore obtained by action; nor any existing statutory provisions relating to actions, not inconsistent with this act, and, in substance, applicable to the actions hereby provided; nor any proceedings provided for by chapter 5 of the second part of the Revised Statutes, or by the sixth and eighth titles of chapter 5 of the third part of those statutes, or by chapter 8 of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter 9 of the same part; except that This act not to affect certain proceedings and statutory provisions; mandamus.

when, in consequence of any such proceeding, a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, that, where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed.

In actions or proceedings by mandamus, amendments of any mistakes in the process, pleadings or proceedings therein may be allowed, and shall be made in conformity to the provisions of chapter 6, title 6 of the second part of the Code of Procedure.

Certain parts of Revised, and other statutes not repealed.

§ 472. Nothing in this act contained shall be taken to repeal section 23 of article 2 of title 5 of chapter 6, part third of the Revised Statutes, or to repeal an act to extend the exemption of household furniture and working tools from distress for rent and sale under execution, passed April 11, 1842.

This act, when to take effect.

§ 473. This act shall take effect on the 1st day of July, 18[illegible], except that sections 22, 23, 24 and 25 shall take effect immediately.

REPEALING ACT.

CHAPTER 417.

AN ACT to repeal certain acts and parts of acts.

PASSED June 5, 1877.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The following acts, and parts of acts, heretofore passed by the legislature of the State, are hereby repealed, to wit: Acts repealed, etc.

1. Of the first part of the Revised Statutes: Revised Statutes.

Section* twenty-four, twenty-five, twenty-six and twenty-seven, of title fourth of chapter fifth.

2. Of the second part of the Revised Statutes:

(1.) Section* five and six of title fifth of chapter first.

(2.) Sections sixteen, seventeen and twenty-seven of chapter third.

(3.) The following portions of chapter fifth:

All of article first of title first.

The concluding portion of section seventeen of article sixth of the same title, beginning with the words "but whenever any person shall have remained charged."

3. Of the third part of the Revised Statutes:

(1.) The following portions of chapter first:

All of article third of title first.

All of title second, except sections thirty-eight, thirty-nine, forty-three and forty-five, and articles sixth and seventh of that title.

All of title third.

Sections one to twenty-seven, both inclusive, and section forty-five of title fourth.

All of title fifth, except sections four, five, six, seven, twenty-one, twenty-four, twenty-five, twenty-seven, twenty-eight and twenty-nine thereof, and except so much of sections eleven and fourteen thereof, as relates to criminal courts.

(2.) The following portions of chapter second:

Sections two hundred and forty-five, two hundred and forty-six, two hundred and forty-seven and two hundred and forty-eight of title fourth.

* So in the original.

(3.) All of chapter third, except section fourteen of title first; and sections forty, forty-one, forty-four, forty-five and forty-eight, and sections fifty-four to sixty-one, both inclusive, of title second.

(4.) Sections twenty-two to twenty-nine, both inclusive, of title fifth of chapter fifth.

(5.) All of chapter sixth, except sections twelve and thirteen of title second; section fourteen of title fourth, and articles first and second of title sixth.

(6.) All of chapter seventh, except sections fifteen and sixteen of title second; and sections sixty-three to seventy, both inclusive, and sections seventy-four, seventy-five and seventy-six of title third.

(7.) The following portions of chapter eighth:

All of title first.

All of title second.

Section eight of title third.

All of article first of title fourth, except sections one to three thereof, both inclusive, and sections twelve to fifteen thereof, both inclusive.

The following portions of title sixth, to-wit: so much of sections sixteen to twenty-one thereof, both inclusive, as relates to petit jurors, and sections thirty-seven to forty-two thereof, both inclusive.

Section one of title thirteenth.

All of title seventeenth, except sections one, thirteen, fourteen, fifteen, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-two and thirty-five thereof.

(8.) The following portions of chapter ninth:

All of title third, except section sixty-six thereof, and so much of article third thereof as applies to appeals from surrogates' courts.

Code of Procedure.

4. All of the Code of Procedure; except the following sections and parts of sections thereof, to wit:

Sections one to eight, both inclusive.

The introductory clause, and subdivisions two, ten and eleven of section thirty.

Sections fifty-two to seventy-one, both inclusive.

Section one hundred and eleven.

Section one hundred and twelve.

Section one hundred and eighteen.

Section one hundred and thirty-two.

The introductory clause, and subdivisions one and four of section one hundred and thirty-six.

Section one hundred and sixty-six.

The concluding portion of section one hundred and sixty-seven, beginning with the words "in actions to foreclose mortgages."

Sections two hundred and six to two hundred and seventeen, both inclusive.

Section two hundred and twenty-four.

Section two hundred and forty-three.

The introductory clause, and subdivisions three and four of section two hundred and forty-four.

Those portions of section two hundred and fifty-six, which are not inconsistent with or superseded by the act chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, entitled "An act relating to courts, officers of justice and civil proceedings."

That portion of section two hundred and sixty-one, beginning with the words "in an action for the recovery of specific personal property," and ending with the words "or taking and withholding such property."

Section two hundred and seventy-seven.

The concluding portion of section two hundred and eighty-four, beginning with the words "when judgment shall have been rendered."

Sections two hundred and ninety-two to three hundred and nine, both inclusive.

Sections three hundred and eleven to three hundred and twenty-two, both inclusive.

Sections three hundred and fifty-one to three hundred and seventy-one, both inclusive.

Sections three hundred and seventy-five to three hundred and eighty-one, both inclusive.

Sections four hundred and twenty-seven to four hundred and sixty-nine, both inclusive.

Sections four hundred and seventy-one to four hundred and seventy-three, both inclusive.

5. Of the laws of eighteen hundred and thirty-one: 1831.

Chapter one hundred and ninety-one.

6. Of the laws of eighteen hundred and thirty-two: 1832.

Chapters one hundred and twenty-eight, one hundred and fifty-eight and two hundred and seventy-six.

7. Of the laws of eighteen hundred and thirty-three: 1833.

Chapters fourteen, one hundred and fifty-nine and one hundred and eighty-seven.

All of chapter two hundred and seventy-one, except section six thereof.

8. Of the laws of eighteen hundred and thirty-four: 1834.

Chapters ninety-four and two hundred and sixty-two.

9. Of the laws of eighteen hundred and thirty-five: 1835.

Chapters one hundred and fifty-nine, one hundred and eighty-nine, one hundred and ninety-seven and two hundred and eleven.

10. Of the laws of eighteen hundred and thirty-six: 1836.

Chapters four hundred and thirty-nine, four hundred and ninety-nine and five hundred and twenty-five.

11. Of the laws of eighteen hundred and thirty-seven: 1837.

Chapers* ninety-three, one hundred and sixty-four, four hundred and sixty-two and four hundred and sixty-eight.

12. Of the laws of eighteen hundred and thirty-eight: 1838.

Chapter one hundred and twenty-nine.

13. Of the laws of eighteen hundred and thirty-nine: 1839.

Chapter one hundred and sixteen.

Sections one, two, five, six, nine, ten, fourteen, fifteen, seventeen, eighteen and twenty of chapter two hundred and ten.

All of chapters three hundred and three, three hundred and seventeen and three hundred and forty-six.

14. Of the laws of eighteen hundred and forty: 1840.

Chapter two hundred and fifty-one, except sections nine and ten thereof.

All of chapter two hundred and seventy-six.

15. Of the laws of eighteen hundred and forty-one: 1841.

Chapters one hundred and ninety-three, two hundred and twenty-four, two hundred and forty-two, two hundred and seventy-two and two hundred and eighty-two.

16. Of the laws of eighteen hundred and forty-two: 1842.

Chapter one hundred and nine, except section five thereof.

* So in the original.

Section one of chapter one hundred and fifty-seven.

1843. 17. Of the laws of eighteen hundred and forty-three:

Chapters eighty-eight and one hundred and eighty-eight.

1844. 18. Of the laws of eighteen hundred and forty-four:

Chapter one hundred and four, except section two thereof.

All of chapters one hundred and forty-eight, two hundred and ninety-five and three hundred and twenty-four.

1845. 19. Of the laws of eighteen hundred and forty-five:

Chapter twenty-four.

Section one of chapter one hundred and twelve.

All of chapters one hundred and thirty-three, one hundred and sixty-three, two hundred and twenty-nine, two hundred and thirty-one, two hundred and thirty-four and three hundred and three.

1846. 20. Of the laws of eighteen hundred and forty-six:

Chapters two, thirty-two, seventy-five, one hundred and twenty, one hundred and fifty, two hundred and forty and two hundred and forty-three.

1847. 21. Of the laws of eighteen hundred and forty-seven:

Chapter eighty-five.

Section one of chapter one hundred and thirty-four.

Section fifteen of chapter two hundred and seventy-six.

Sections twelve, thirteen and fourteen of chapter two hundred and seventy-seven.

All of chapter two hundred and eighty, except the following portions thereof, to wit: article first and article fifth; sections twenty-two, twenty-five, thirty-two, thirty-three, thirty-seven and sixty-five; and so much of sections twenty-eight and forty-five as applies to surrogates' courts.

All of chapter three hundred and seventy-seven.

Sections two and three of chapter three hundred and ninety.

Sections one to six, both inclusive, of chapter four hundred and ten.

All of chapter four hundred and seventy, except sections fourteen, twenty-six, thirty-two, thirty-three, thirty-five, forty-five and fifty-three thereof.

All of chapter four hundred and ninety-five, except the last sentence of section two thereof.

1848. 22. Of the laws of eighteen hundred and forty-eight:

Chapters two hundred and twenty-two, two hundred and twenty-four, two hundred and seventy-seven, three hundred and seventy-nine and three hundred and eighty.

1849. 23. Of the laws of eighteen hundred and forty-nine:

Chapter eight.

All of chapter one hundred and twenty-four, except sections one and thirteen thereof.

All of chapter one hundred and twenty-five, except sections one, eleven, twelve, twenty and twenty-one thereof, and sections twenty-seven to thirty-nine thereof, both inclusive; but the repeal of section ten does not affect section five of chapter sixty-six of the laws of eighteen hundred and sixty-three; and the repeal of section twenty-four does not affect section twelve of chapter four hundred and seventy of the laws of eighteen hundred and seventy.

Sections five, eight, nine and ten of chapter one hundred and forty-four.

Section thirty-two of chapter two hundred and twenty-six.

All of chapters three hundred and thirty-three and three hundred and thirty-seven.

Sections eleven to eighteen, both inclusive, of chapter four hundred and thirty-nine.

24. Of the laws of eighteen hundred and fifty: 1850.

Chapters one, fifteen and forty-one.

Sections one to ten, both inclusive, of chapter one hundred and two.

Chapter one hundred and twenty-eight.

Sections one, two, three, four, nine and ten of chapter one hundred and thirty-eight.

Section three of chapter two hundred and twenty-five.

All of chapters two hundred and forty-five, two hundred and sixty and two hundred and ninety-five.

25. Of the laws of eighteen hundred and fifty-one: 1851.

Chapters two and twenty-one.

Sections seven, eight and ten of chapter forty-three.

All of chapters two hundred and two and two hundred and eleven.

All of chapter four hundred and eighty-eight, except the concluding portion of section two thereof, beginning with the words "and in case of the inability or omission."

26. Of the laws of eighteen hundred and fifty-two: 1852.

Chapter forty-four.

All of chapter three hundred and fourteen, except section one thereof.

All of chapter three hundred and seventy-four, except sections seven and eight thereof.

Sections four, six, seven, nine and ten of chapter three hundred and eighty-nine.

27. Of the laws of eighteen hundred and fifty-three: 1853.

So much of chapter ninety-one as amends sections seven and ten of chapter forty-three of the laws of eighteen hundred and fifty-one.

All of chapter three hundred and thirty-eight, except section four thereof.

All of chapters three hundred and eighty-seven and four hundred and fifty-four.

So much of section nine of chapter four hundred and ninety-eight as relates to petit jurors.

All of chapters five hundred and eleven, five hundred and twenty-nine and five hundred and fifty-four.

Sections one, two and three of chapter six hundred and seventeen.

28. Of the laws of eighteen hundred and fifty-four. 1854.

Chapter seventy-five.

All of chapter ninety-six, except sections six, twelve, twenty-six and twenty-seven thereof, and sections thirty to thirty-nine thereof, both inclusive.

Sections one, five and six of chapter one hundred and ninety-eight.

Sections one and two of chapter two hundred and seventy.

29. Of the laws of eighteen hundred and fifty-five 1855.

Chapter two hundred and seventy-nine.

Section three of chapter three hundred and ten.

All of chapter five hundred and thirty.

30. Of the laws of eighteen hundred and fifty-six: 1856.

Chapter one hundred and sixty-six.

31. Of the laws of eighteen hundred and fifty-seven: 1857.

Chapter sixty.

Section two of chapter one hundred and eighty-three.

Section six of chapter two hundred and ninety-five.

All of chapter three hundred and sixty-one, except sections nine and ten thereof.

All of chapter five hundred and sixty-seven.

1858. 32. Of the laws of eighteen hundred and fifty-eight:

Chapters thirty-seven, one hundred and seven and two hundred and forty-four.

All of chapter three hundred and twenty-two, except sections one to five thereof, both inclusive, sections thirty to thirty-five thereof, both inclusive, and sections thirty-seven and thirty-eight thereof.

Section two of chapter three hundred and thirty-four.

1859. 33. Of the laws of eighteen hundred and fifty-nine:

Chapter one hundred and thirty-four.

Section two of chapter one hundred and seventy-nine.

All of chapter one hundred and ninety-eight.

Section three of chapter two hundred and twelve.

Section one of chapter two hundred and sixty-two.

Section two of chapter two hundred and sixty-seven.

All of chapters three hundred and seventy-nine and four hundred and forty.

1860. 34. Of the laws of eighteen hundred and sixty:

Chapter six and one hundred and sixty-seven.

So much of chapters one hundred and eighty-seven and two hundred and two, as requires the graduates therein specified to be admitted to practice, upon the production of their diplomas.

1861. 35. Of the laws of eighteen hundred and sixty-one.

Chapters eight, sixty-one, seventy-three, eighty-six, two hundred and ten, and two hundred and eighty-eight.

1862. 36. Of the laws of eighteen hundred and sixty-two:

Chapters fifty-three, eighty-six, two hundred and fifty-one, and three hundred and seventy-five.

Section four of chapter three hundred and seventy-eight.

All of chapter four hundred and seventy-one.

Sections one and two of chapter four hundred and eighty-four.

1863. 37. Of the laws of eighteen hundred and sixty-three:

All of chapter sixty-six, except section five thereof.

All of chapters one hundred and eighty-six, two hundred, two hundred and six and two hundred and twelve.

Section three of chapter two hundred and forty-six.

The second sentence of section one of chapter four hundred and twelve.

So much of section one of chapter five hundred and six as relates to petit jurors.

1864. 38. Of the laws of eighteen hundred and sixty-four:

Chapters forty-six, ninety-five, five hundred and forty-three and five hundred and seventy-eight.

1865. 39. Of the laws of eighteen hundred and sixty-five:

All of chapter one hundred and seventy, except section six thereof, as amended by section one of chapter seven hundred and ninety-six of the laws of eighteen hundred and sixty-seven.

Chapter two hundred and eighteen.

Section one of chapter two hundred and ninety-six.

The concluding portion of section one of chapter three hundred and nine, beginning with the words, "and in any action in any of the courts."

All of chapters five hundred and twelve, and five hundred and fifty-five.

40. Of the laws of eighteen hundred and sixty-six: 1866.

Chapters one hundred and seventy-four, one hundred and seventy-five, three hundred and eleven, four hundred and twenty-two, four hundred and thirty-seven, five hundred and eighty-eight, and seven hundred and eighty-two.

Sections one to ten, both inclusive, of chapter eight hundred and twenty-one.

41. Of the laws of eighteen hundred and sixty-seven: 1867.

Chapters one hundred and sixteen, two hundred and eleven, two hundred and seventy-one, three hundred and eighty-three and four hundred and ninety-four.

The first sentence of section three of chapter seven hundred.

All of chapter seven hundred and eighty-four.

Sections two and three of chapter seven hundred and ninety-six.

All of chapter eight hundred and eighty-seven, except so much thereof as relates to proceedings in a criminal cause.

42. Of the laws of eighteen hundred and sixty-eight: 1868.

Chapter five hundred and ninety-six.

All of chapter seven hundred and sixty-five, except sections one and three thereof.

43. Of the laws of eighteen hundred and sixty-nine: 1869.

Chapters ninety-nine and one hundred and thirty-three.

Section one of chapter one hundred and fifty-seven.

All of chapter four hundred and eighteen.

Section five of chapter four hundred and thirty-three.

All of chapters five hundred and eighty-nine and six hundred and twenty-six.

Section one of chapter six hundred and sixty-four.

All of chapters six hundred and seventy-four, eight hundred and seven and eight hundred and thirteen.

44. Of the laws of eighteen hundred and seventy: 1870.

Chapter forty-nine.

Section eight of chapter eighty-six.

All of chapter three hundred and thirteen, except sections eight and ten thereof.

Sections one to eight, both inclusive, and sections ten to fourteen, both inclusive, of chapter four hundred and eight.

All of chapter four hundred and nine.

Section one of chapter four hundred and sixty-seven.

All of chapter four hundred and seventy, except sections one, eight, nine, ten, twelve and eighteen thereof; but the repeal of section twenty does not affect section seven of chapter two hundred and eighty-two of the laws of eighteen hundred and seventy-one.

All of chapter five hundred and thirty-nine, except sections seventeen, twenty-six, twenty-seven and twenty-eight thereof, and so much of section seven thereof as relates to grand jurors.

Sections one, three and five of chapter five hundred and eighty-two.

Sections one and two of chapter six hundred and forty-eight.

45. Of the laws of eighteen hundred and seventy-one: 1871.

Chapters sixteen and two hundred and eight.

All of chapter two hundred and eighty-two, except section seven thereof.

All of chapter four hundred and eighty-six.

The concluding portion of section five of chapter five hundred and eighty-three, beginning with the words "and all actions or proceedings in which the mayor."

Section two of chapter six hundred and three.

All of chapters seven hundred, seven hundred and ten, seven hundred and thirty-three, seven hundred and forty-four and seven hundred and sixty-six.

Sections one and five of chapter seven hundred and ninety-nine.

1872. 46. Of the laws of eighteen hundred and seventy-two:

Chapters sixteen, one hundred and thirty-nine and two hundred and sixty.

All of chapter four hundred and thirty-eight, except so much as relates to criminal courts.

All of chapters four hundred and ninety-nine, five hundred and nineteen, five hundred and thirty-five and five hundred and thirty-eight.

Sections one, three, eight and twelve of chapter six hundred and twenty-nine.

All of chapters six hundred and eighty-eight and seven hundred and seventy-eight.

1873. 47. Of the laws of eighteen hundred and seventy three:

So much of sections one and two of chapter seventy as prescribes a preference of causes on the calendars of courts.

Section one of chapter one hundred and sixty-five.

Section one of chapter one hundred and sixty-six.

All of chapters one hundred and ninety-six, two hundred and twelve, two hundred and thirty-nine and two hundred and ninety-nine.

So much of chapter four hundred and twenty-seven as relates to civil causes.

Sections two and three of chapter four hundred and fifty-three.

All of chapter six hundred and three.

1874. 48. Of the laws of eighteen hundred and seventy-four:

Chapter fifty-two.

All of chapter fifty-seven, except section three thereof.

All of chapter two hundred and thirty-two, except section five thereof.

All of chapter three hundred and twenty-two.

Sections four, five, eight and thirteen of chapter five hundred and forty-five.

1875. 49. Of the laws of eighteen hundred and seventy-five:

Chapters three and thirty-two.

Section five of chapter forty-nine.

All of chapters fifty-two, one hundred and twenty-seven, one hundred and thirty-one, one hundred and thirty-nine and one hundred and sixty-seven.

Sections one and four of chapter two hundred and fifty-one.

All of chapter three hundred and sixty-six.

All of chapter four hundred and seventy-nine, except section forty-one thereof, sections forty-three to fifty-two thereof, both inclusive, and sections fifty-four and fifty-five thereof.

All of chapter six hundred and sixteen.

Repeal by last preceding section, effect of.

§ 2. The repeal, by the last preceding section, of the portions of the Revised Statutes and of the Code of Procedure therein specified, effects also the repeal of so much of the existing laws as expressly amends the portions so repealed, by adding to or otherwise altering the text thereof. The description contained in the last preceding section of statutes, other than the Revised Statutes or the Code of Procedure,

refers to the statutes as they appear in the volumes of the laws of each session, printed and published by the State printer until the year eighteen hundred and forty-two, and after that year under the direction of the secretary of state.

§ 3. The repeal, effected by the first section of this act, is subject to the following qualifications: Qualifications of repeal

1. It does not render ineffectual, or otherwise impair, any proceeding in an action or special proceeding, taken, according to any provision of the existing laws, before this act takes effect; and, where it would render ineffectual, or otherwise impair such a proceeding, that provision must be deemed to remain unrepealed, for the purpose of avoiding such a result.

2. It does not affect any lawful act done, or right accrued or established, before this act takes effect; but every such act or right remains as valid and effectual as if this act had not been passed.

3. It does not affect any offense committed, or penalty or forfeiture incurred, before this act takes effect; except that the proceedings in a civil action or special proceeding, brought by reason thereof, are subject to the provisions of the laws in force after that time.

4. It does not affect the jurisdiction, power, or authority of any court or judge in a criminal action or special proceeding, nor does it affect any future proceeding, taken, according to the existing laws, in such an action or special proceeding, except as otherwise prescribed in subdivision eighth of this section, or in the act chapter four hundred and forty-nine of the laws of eighteen hundred and seventy-six, entitled "An act explaining, defining and regulating the effect and application of, and otherwise relating to, the act, passed at this session of the legislature, entitled 'An act relating to courts, officers of justice and civil proceedings.'"

5. It does not affect the jurisdiction, power or authority of the court of common pleas for the city and county of New York, in an appeal from a determination of the marine court of the city of New York, or of a district court of that city, or any proceeding upon such an appeal.

6. It does not affect the power or authority of a court, other than the supreme court, a superior city court, the marine court of the city of New York, or a county court, in an action or special proceeding of which such a court retains jurisdiction under the laws in force after this act takes effect; nor does it affect any future proceeding taken, according to the existing laws, in such an action or special proceeding, except as otherwise prescribed in the act specified in subdivision fourth of this section.

7. It does not affect the jurisdiction, power or authority of a mayor's or recorder's court, or of a judge thereof, in or over an action or special proceeding commenced in such a court before this act takes effect; nor does it affect any future proceeding taken, according to the existing laws, in such an action or special proceeding, except as otherwise prescribed in the act specified in subdivision fourth of this section.

8. It does not affect any list or drawing of grand or petit jurors, or the ballots containing their names, prepared or made according to the existing laws, until a new list or new ballots, are prepared, or a new drawing is made, as prescribed in the act, chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, entitled "An act relating to courts, officers of justice and civil proceedings," and in the act specified in subdivision fourth of this section. Nor does it affect the qualifications or exemptions of grand or petit jurors until the provisions of those acts, relating to the same subjects, take effect.

9. It does not affect an execution issued out of a court of record, before this act takes effect; or the proceedings taken by virtue of such an execution, including the sale of property and the redemption of real property, or a chattel real, sold by virtue thereof. All such proceedings are governed by the provisions of the existing laws relating thereto; which provisions, for that purpose, remain in force as if this act had not been passed.

10. It does not affect any provisions of the existing laws prescribing the place or places where one or more terms of a court, other than the terms of the court of appeals, or the general terms of the supreme court, must or may be held.

11. Except as otherwise prescribed in section two of this act, the repeal of any provisions of the existing laws, which has* been amended by a subsequent provision of those laws, not expressly repealed by this act, does not affect the subsequent provision.

12. The repeal of any provision of the existing laws does not revive any law repealed by the latter.

13. The repeal of a law heretofore repealed is not to be construed as a declaration or implication that the repealed law has been in force at any time subsequent to the formal repeal.

14. The repeal of a portion of a law is not to be construed as reviving any other portion of that law which has been expressly or impliedly repealed by a law subsequently enacted.

15. Where a provision of the existing laws, incorporated into or adopted, or otherwise referred to, in any provision of the existing laws remaining in force after this act takes effect, is repealed, that provision, nevertheless, remains in force for the purpose to which it is so referred to, and for no other, except that where it has been revised in and made a part of the act chapter four hundred and forty-eight of the laws of eighteen hundred and seventy-six, entitled "An act relating to courts, officers of justice and civil proceedings," the reference is to be construed as applying to the appropriate provisions so revised.

16. The repeal of any of the existing laws creating, or otherwise relating to, an office or employment, where the same, or a corresponding office or employment, is provided for or recognized in the act specified in subdivision fifteen of this section, or in any of the existing laws remaining in force after this act takes effect, does not create a vacancy therein, or affect the compensation of the incumbent.

17. The repeal of the laws conferring upon a graduate of the law department of the University of Albany, or of the law department of the University of the City of New York, or of the law school of Columbia College, or of the law department of Hamilton College, the right to be admitted to practice as an attorney or counsellor at law, upon the production of his diploma, does not affect the right of a person who was a student in, or was graduated by, either of those departments of schools on or before the first day of April, eighteen hundred and seventy-six, to be so admitted at any time within one year after this act takes effect, upon his complying with the existing laws relating to the admission of such a graduate to practice.

§ 4. The term, "existing laws," as used in this act, designates the statutes of the State remaining unrepealed on the day before this act takes effect.

Act takes effect September 1, 1877.

§ 5. This act shall take effect on the first day of September, eighteen hundred and seventy-seven.

*So in the original.

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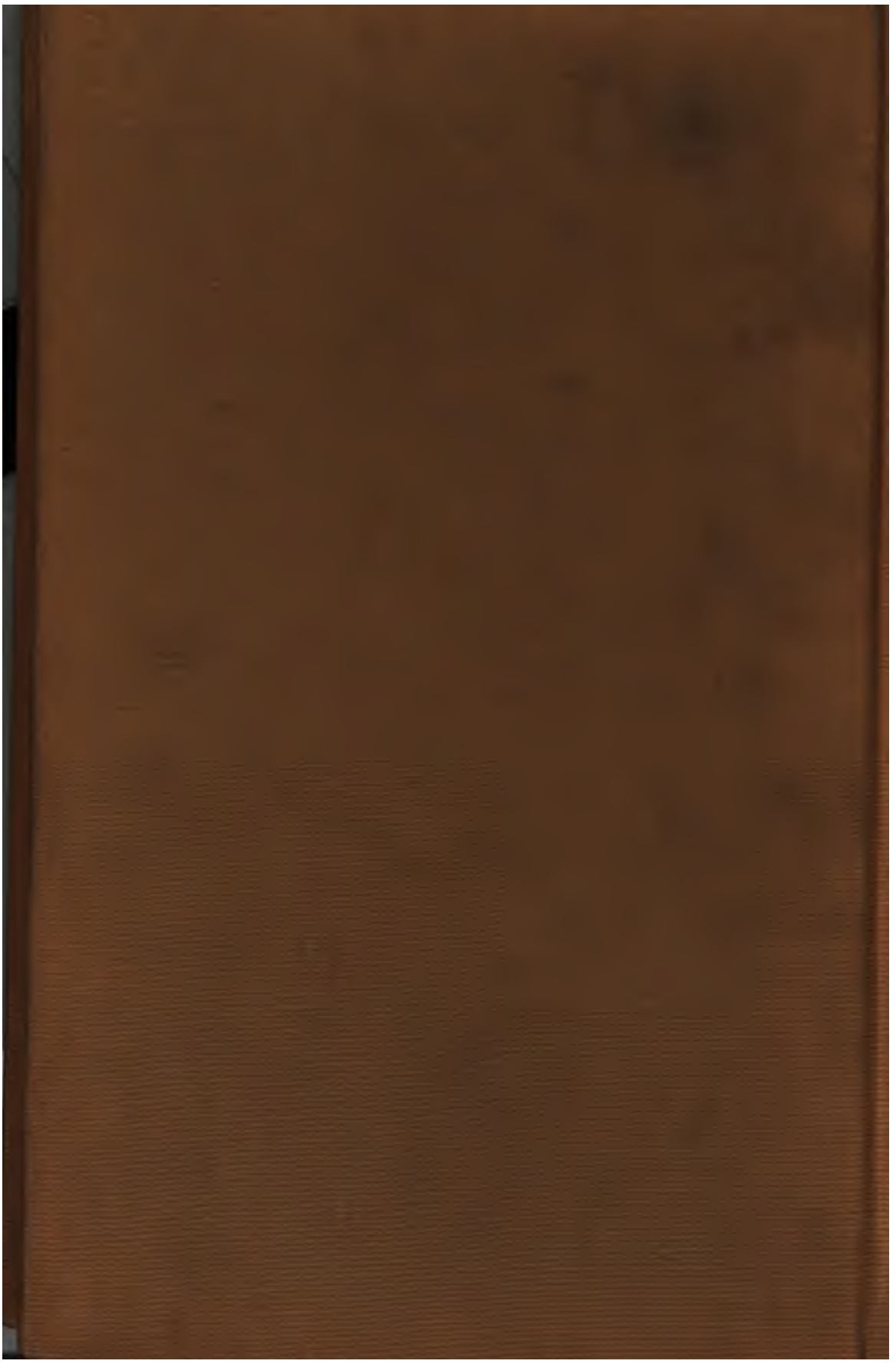
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